Petition

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81-1597

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

Martin Joseph Kilcoyne,
Petitioner

v.

Robert Morgan, etc. et al.,
Defendant.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

* *

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QUESTIONS PRESENTED

I. DOES A FACULTY MEMBER AT A STATE UNIVERSITY ACQUIRE DE FACTO TENURE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY BEING REHIRED BEYOND THE PROBATIONARY PERIOD WHERE THE UNIVERSITY'S OWN REGULATIONS, WHICH ARE PART OF THE CONTRACT OF EMPLOYMENT, SPECIFY THAT AFTER A CERTAIN PROBATIONARY PERIOD FACULTY MEMBERS HAVE TENURE?

II. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE A STATE UNIVERSITY TO FOLLOW ITS OWN REGULATIONS GOVERNING DENIAL OF TENURE TO PROBATIONARY FACULTY MEMBERS, WHERE THOSE REGULATIONS ARE PART OF THE CONTRACT OF EMPLOYMENT?

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Petitioner Martin Joseph Kilcoyne respectfully prays that a Writ of Certiorari issue to review the Judgments and opinions of the United States Court of Appeals for the Fourth Circuit, with the final opinion terminating this matter with finalty in the lower court entered on November 27, 1981.

OPINIONS BELOW.

The most recent and final opinion of the United States Court of Appeals for the Fourth Circuit in this case, No. 81-1069, is reported at _____ F.2d _____, and is reproduced as Appendix A.

The final Order by the United States District Court for the Eastern District of North Carolina

adopting the Magistrate's Memorandum and Recommendation of dismissal is reproduced as Appendix B, with the Magistrate's Memorandum and Recommendation reproduced as Appendix C.

The Order by the United States District Court for the Eastern District of North Carolina adopting the Magistrate's Memorandum and Recommendation of partial summary judgment and partial dismissal is reproduced as Appendix D, with the Magistrate's Memorandum and Recommendation reproduced as Appendix E.

The first opinion in this case of the United States Court of Appeals for the Fourth Circuit, No. 75-1372, is reported at 530 F.2d 968, rehearing denied, and is reproduced as Appendix H, with the order denying rehearing reproduced as Appendix F. A Supplemental Opinion following a petition to reconsider filed by the plaintiff is unpublished, but is reproduced as Appendix G.

The initial opinion of the United States District Court for the Eastern District of North Carolina in this cause is reported as 405 F.Supp. 828 (E.D.N.C. 1975) and is reprinted as Appendix I.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 27, 1981. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

QUESTIONS PRESENTED.

I. Does a faculty member at a state university acquire de facto tenure under the

Due Process Clause of the Fourteenth Amendment of the United States Constitution by being rehired beyond the probationary period where the university's own regulations, which are part of the contract of employment, specify that after a certain probationary period faculty members have tenure?

II. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a state university to follow its own regulations governing denial of tenure to probationary faculty members, where those regulations are part of the contract of employment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States:

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within any jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE.

This action was commenced by Plaintiff-Petitioner in the District Court for the Eastern District of North Carolina to challenge the termination of Petitioner's employment as an Associate Professor of History at East Carolina University, a constituent institution of the greater University of North Carolina.

Two basic issues were raised by the complaint: (1) did Defendant-Respondents' (hereinafter respondents) regulations bestow de facto tenure upon the plaintiff-petitioner (hereinafter petitioner) and (2) did the respondents fail to follow their own regulations and, if so, was this failure a denial of due process.

In a Memorandum Opinion and Order filed on February 5, 1975, the United States District Court for the Eastern District of North Carolina adopting the Magistrate's recommendation granted respondent's motion for summary judgment holding that plaintiff had neither achieved tenure nor been deprived of constitutional rights. Kilcoyne v. Morgan, 405 F.Supp. 828 (E.D.N.C. 1975) [A36.]

Plaintiff appealed this decision to the Fourth Circuit Court of Appeals. At that time there were essentially two issues before this Court: whether the trial court was correct in granting summary judgment in favor of the university officials on the question of whether Professor Kilcoyne had acquired de facto tenure; and whether the trial court was correct

in granting summary judgment in favor of the university on the alleged violation of Professor Kilcoyne's due process rights and state contract rights. The Fourth Circuit held that the trial court was correct in all respects, and that summary judgment properly lay for the university officials against Professor Kilcoyne. Kilcoyne v. Morgan, 530 F.2d 968 (4th Cir. 1975). A34. On Professor Kilcoyne's petition for rehearing, however, in an unpublished supplemental opinion, the court while adhering to its original opinion that Professor Kilcoyne had not acquired de facto tenure, vacated summary judgment in favor of the university and remanded the issues in the case, other than the de facto tenure issue, to the trial court. A31. Following this supplemental opinion on petition to rehear, the respondents filed a petition for rehearing, which was denied without prejudice of the officials to present their arguments in the district court. A30.

On remand, the respondents again moved for summary judgment on the grounds that the federal claim lacked substance and that the pendent state claim would fall on dismissal of the due process allegations. On February 5, 1980, Judge Larkins, senior district court judge for the Eastern District of North Carolina, accepted the magistrate's recommendation [A11] and granted summary judgment on the federal due process claim, but retained jurisdiction over the state claim and declined to dismiss the case as a whole.

Later, however, following respondents' motion to dismiss the entire case predicated upon a decision of the Supreme Court of North Carolina, the magistrate recommended that the entire case be dismissed. [A7]. The trial court adopted this recommendation, and

and dismissed the entire case on November 25, 1980. The Petitioner gave timely notice of appeal and the Fourth Circuit affirmed the judgments below.

REASONS FOR ALLOWING THE WRIT.

I. ASSOCIATE PROFESSOR MARTIN JOSEPH KILCOYNE HAD ACQUIRED DE FACTO TENURE AS A MATTER OF DUE PROCESS UNDER EAST CAROLINA UNIVERSITY FACULTY REGULATIONS BY BEING RETAINED TO TEACH AND ACTUALLY TEACHING ONE FULL YEAR BEYOND THE PROBATIONARY PERIOD, AND THE DECISIONS OF THE COURTS BELOW TO THE CONTRARY ARE NOT CONSISTENT WITH THIS COURT'S DECISION IN PERRY V. SINDERMANN.

The parties to this litigation have stipulated that the East Carolina University Faculty Manual in effect for the time period here involved was a part of the employment contract of every faculty member, including Dr. Kilcoyne. The District Court noted this fact in its first opinion in this matter, 405 F.Supp. 828, Appendix p. A40. Some ten years ago in Perry v. Sindermann, 408 U.S. 593 (1972), this Court held that in tenure cases involving faculty members at state institutions, the Due Process Clause of the Fourteenth Amendment protects property interests created and defined by existing rules or understandings which stem from an independent source, such as a contract or even mutually explicit understandings not embodied in a formal written contract. The courts below have utterly failed to correctly apply the law as articulated by the Court in Perry to Dr. Kilcoyne's case; accordingly, the Court should grant certiorari to review the Fourth Circuit's decision in No. 75-1372, 530F.2d 968.

A written contract as exists here preforce means a meeting of the minds between the state

supported university and Dr. Kilcoyne. And a meeting of the minds means that there are, therefore, mutually explicit understandings between the university and Dr. Kilcoyne which have as their source not the unilateral expectation of one party, but the independent provisions set forth in the Faculty Manual.

The East Carolina University Faculty Manual effective for the operative years here involved, 1971-73, provides at page 48 (Appendix, p. A59):

> Tenure
>
> After the expiration of a probationary period, faculty members are considered to have tenure and their services will be terminated only for adequate cause. Tenure ends at age sixty-five. See Appendix C for complete statement of Tenure and Academic Due Process.

Appendix C provides in pertinent part, at page 94 (Appendix p. A52):

> B. After the expiration of a probationary period [instructors and assistant professors five years, associate professors and professors three years], full-time faculty members have tenure, and their services will be terminated only for adequate cause.

[Emphasis added.]

There is no dispute in this case that Dr. Kilcoyne came to East Carolina University as a full-time associate professor after declining to become department chairman of the History Department at Montana State University in order to do so; no dispute that he served the requisite full three years in the rank of associate

professor; and no dispute that he was terminated after his fourth full year as associate professor without any cause being given or reasons advanced.

Because of the above unequivocal language in the Faculty Manual, then, Dr. Kilcoyne necessarily obtained tenure when he returned at the invitation of university officials to teach in the rank of associate professor for a fourth full academic year, since throughout the probationary period he was an associate professor.

The university's position, adopted by the District Court below in its first opinion in this matter, which opinion on this aspect of the case was also adopted by the Fourth Circuit (Appendices H and I), was to the effect that tenure must be formally pronounced, apparently in the form of a letter or document from the Chancellor of the university, some time prior to the end of the probationary period for one to achieve tenure. Under the rationale of the courts below, if no formal pronouncement of tenure is forthcoming, then the faculty member cannot acquire tenure, no matter how long he may teach beyond the probationary period. Such a rationale, of course, is completely contrary to this Court's decision in Perry v. Sindermann, supra. It is also contrary to the clear language of the above-quoted provisions of the state university's own regulations, which contemplate the automatic attainment of tenure if the faculty member returns to teach on a full-time basis, as petitioner Kilcoyne did, beyond the probationary period required in the Faculty Manual's Appendix C.

The District Court in its first opinion, which dealt with the de facto tenure aspect of the case, adopted the university's position because of the Faculty Manual's separate requirement, under Appendix C, page 94 (Appendix p. A52), which sets forth specific dates by which faculty members without tenure must be notified of whether they will be rehired for the ensuing academic year. The District Court seemed to believe that if the specific language quoted above from the Faculty Manual were given its plain meaning, then the probationary period for faculty members would be shortened by one full academic year as a practical matter. Such a result is not anomalous, however. As part of the record in the courts below, it may be seen that page 2 of the Faculty Manual that East Carolina University subscribes to the statement of principles adopted by the American Association of University Professors in 1940. There are also statements to this effect contained in affidavits submitted by university administrators in opposition to Dr. Kilcoyne's motion for preliminary injunctive relief. The 1940 principles of the AAUP were included in the record below because of the foregoing, and contain this significant sentence:

> Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

The interpretative comment to the above subparagraph expounds further:

> The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must

> be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one.

[Emphasis added.]

Because the Faculty Manual incorporated the AAUP 1940 principles by reference, the above provisions were also part of Dr. Kilcoyne's employment contract with the university, and should have been given effect instead of being ignored by the courts below. It can readily be seen that the AAUP as long ago as 1940 was of the opinion that institutions of higher learning should make a final decision on tenure at least one year prior to the expiration of the probationary period. The manner in which Appendix C is written, when construed in its entirety, does exactly what the AAUP says that it should do. Thus, the position of the university and the courts below holding that Dr. Kilcoyne was not entitled to tenure when retained to teach one full year beyond the end of the probationary period for faculty members of his rank because the university had the right to decide against the award of tenure even at the very end of the probationary period is simply wrong.

Furthermore, in granting summary judgment in favor of the university on the de facto tenure issue, the courts below ignored affidavits of the Plaintiff Kilcoyne to the effect that faculty members read the Faculty Manual with the same understanding as he had and the AAUP principles support; deposition testimony from a department chairperson (other than Dr. Kilcoyne's) to the effect

that he likewise understood the tenure provisions of the Faculty Manual the same way Dr. Kilcoyne did; a memorandum from the university Provost supportive of Dr. Kilcoyne's interpretation; and minutes from a faculty senate meeting where adoption of the Faculty Manual's provisions were under discussion in 1965 which show that one Mr. Gray noted that the Faculty Manual seemed to indeed mean that a faculty member would achieve tenure in effect one year prior to the expiration of the probationary period and further noted that "this requirement is consistent with standards set by the American Association of University Professors." (Ironically, this same Mr. Gray submitted an affidavit in support of the university's position after this case was brought; but the record clearly shows that he was of the view pressed by Dr. Kilcoyne prior to the litigation when the wording of the Manual was being discussed before its adoption.) All of these points were briefed in more extensive detail than here appear by Dr. Kilcoyne in the Fourth Circuit in No. 75-1372.

Clearly, under the rationale of Perry v. Sindermann, supra, and Rule 56 of the Federal Rules of Civil Procedure, summary judgment in favor of the university was inappropriate on the de facto tenure issue.

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES A STATE UNIVERSITY TO FOLLOW ITS OWN REGULATIONS GOVERNING DENIAL OF TENURE TO NON-TENURED FACULTY MEMBERS WHERE THE REGULATIONS ESTABLISH PROCEDURES FOR THE DECISION-MAKING PROCESS, AND THE FOURTH CIRCUIT'S OPINION BELOW TO THE CONTRARY IS IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

In No. 81-1069, _____ F.2d _____, Appendix A, the Fourth Circuit opinion finally deciding all issues adversely to Plaintiff Kilcoyne in the lower courts, the Fourth Circuit upheld a District Court finding that Plaintiff's expectations that Appendix B of the Faculty Manual would be followed were unilateral and did not amount to a property interest sufficient to invoke the Due Process Clause.

Because, as was discussed supra, the entire Faculty Manual was part of a contract the university had with Dr. Kilcoyne, his expectations that the state university would fulfill its part of the bargain were not unilateral as a matter of constitutional law. Perry v. Sindermann, supra. And the lower courts' holdings that Dr. Kilcoyne did not have a sufficient property interest to invoke the Due Process Clause of the Fourteenth Amendment is also wrong and contrary to this Court's opinion in Greenholtz v. Inmates of Nebraska Penal Correctional Complex, 442 U.S. 1 (1979), and decisions from the Fifth and Seventh Circuits.

Appendix B to the Faculty Manual (Appendix J accompanying this Petition for Certiorari) guaranteed a faculty member -- such as Dr. Kilcoyne -- tenure unless there is demonstrably objective reasons, supported by definite evidence supporting the decision, file against the award of tenure. Thus, the regulations pertinent to the case here require tenure -- unless the university officials can point with specificity to definite, demonstrable evidence not to award tenure.

Throughout the history of this litigation, as long as it has been, none of the Defendants has ever pointed out to any court any demonstrably objective reason -- or any reason at all, for

that matter -- as to why Dr. Kilcoyne should not have received tenure. To be sure, the Defendants in self-serving conclusory affidavits assured the lower courts that they really did have some reasons to deny Dr. Kilcoyne tenure (though none have ever been articulated): that these reasons were considered by them in good faith; and that the reasons really are supported by demonstrably objective evidence (though they have supplied no evidence at all for denial of tenure to the courts). Indeed, on discovery Dr. Kilcoyne's entire file and all documents which supposedly served as a demonstrably objective basis for denial of tenure were produced and are in the record. Dr. Kilcoyne's department chairman himself swore during pretrial discovery that the only objective evidence upon which he relied in making the final decision to deny tenure consists of five documents: (1) A letter from the chairman to Dr. Kilcoyne inviting him to a conference without any criticism listed; (2) A second letter in another year inviting Dr. Kilcoyne to a conference without any criticisms; (3) A reply by Dr. Kilcoyne to an annual report questionnaire showing Kilcoyne's activities at the university for a specific time period; (4) Another annual report questionnaire; and (5) A list of Dr. Kilcoyne's publications as of August 1970, a list two years out-of-date as Plaintiff's affidavits opposing summary judgment show when the tenure decision was made by the chairman adverse to Dr. Kilcoyne.

None of the lower court decisions focus upon this woeful lack of objective evidence to support the denial of tenure decision by the chairman and implemented by the Chancellor, although Plaintiff has extensively briefed same and all supporting documents are in the record. This is the most important guarantee

in Appendix B to the Faculty Manual for non-tenured faculty members.

What the lower courts have focused on, because they appear less important guarantees and thus may be easier to deal with in writing an opinion adverse to Dr. Kilcoyne, are other guarantees of the faculty manual such as the right to annual evaluations, to written resumes of those evaluations, and to advance notification of criteria to be utilized in the tenure evaluation process. While these latter three rights may well be lesser rights than the right to a decision against tenure to be based solely upon demonstrably objective evidence, Dr. Kilcoyne is entitled to all of the rights given him by the university's own regulations as a matter of constitutional due process.

In Greenholtz, supra, this Court emphasized that it is not the weight of the interest at stake, but rather its nature, which determines whether the Due Process Clause is triggered. And the Court defined the nature of the interest at stake sufficient to trigger due process be that the person claiming the interest "have a legitimate claim of entitlement to it," citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Of course, Petitioner recognizes that Greenholtz involved the liberty aspect of due process, rather than its property aspect. Nevertheless, for purposes of due process analysis, these two interests are indistinguishable. This is made clear in Greenholtz by citations to Roth and Perry. Moreover, Petitioner recognizes that determining the Due Process Clause applicable does not determine precisely what process is due. In the instant case, the state university's own regulations spell out specifically what process is due: the requirement that decisions not to

tenure be based upon demonstrably objective evidence actually appearing in the administrative file; that decisions be based upon objective criteria publicized in advance; and that non-tenured faculty members be given notice by both personal conference and written resume of progress or lack of progress toward tenure. The first two requirements clearly were not complied with here; the third is the subject of a sharp factual dispute between the parties.

The Fourth Circuit's decision in this case below on the procedural due process issue is not only inconsistent with Greenholtz, supra, but is flatly contrary to the Fifth Circuit's decision in Young v. United States, 498 F.2d 1211 (5th Cir. 1974). In Young, the Fifth Circuit held that regulations in an employment handbook created a property interest for a non-tenured federal employee against arbitrary dismissal from the job. 498 F.2d at 1220. It should be noted that the property interest there found was not a right to employment, but the right to be protected by the safeguards of the institution's regulations against arbitrary dismissal. East Carolina's Faculty Manual at Appendix B seeks to do at least that much.

The Fourth Circuit's decision ultimately disposing of this case is also contrary to the Seventh Circuit's opinion in Paige v. Harris, 584 F.2d 178 (7th Cir. 1978). There, the Seventh Circuit held that a non-tenured employee has a property interest sufficient to invoke the Due Process Clause where the agency's own regulations spelled out in an employment handbook specified certain procedural safeguards had to be met before the non-tenured employee could be discharged. An examination of those portions of the employee handbook set out in the Paige opinion will show that when compared to the

Faculty Manual's Appendix B in this case, the university's faculty manual is much more specific and persuasive in establishing a property interest for Dr. Kilcoyne sufficient to trigger the Due Process Clause.

The regulations of the university here involved were promulgated to insure that there would be no arbitrary dismissals of faculty members, even those not deemed to have achieved formal tenure, and no arbitrary decisions to deny tenure. They were incorporated into Plaintiff's employment contract, and he has just as much right to assert these provisions in the federal courts through the Due Process Clause of the Fourteenth Amendment as did the successful Plaintiffs to invoke the Fifth Amendment's due process guarantee in Paige, supra, and Young, supra.

Assuming, arguendo, that the lower courts were correct in holding as a matter of law that Dr. Kilcoyne did not have de facto tenure, they still erred in refusing to permit him to assert those property rights given to non-tenured faculty members by Appendix B to the Faculty Manual. Indeed, this is a stronger case than the university professor had in Perry v. Sindermann, supra, for there he was relying upon custom and practice which he contended gave rise to mutual understandings between himself and the state university. Here, Dr. Kilcoyne is not relying upon potentially vague or disputable custom and practice claims, rather he is relying upon specific wording in the state university's own regulations that made up a part of his employment contract. He was relying upon the presumption contained in the Faculty Manual that he would be given tenured status unless he were found not to be qualified through the use of demonstrably objective evidence maintained on file by the

university. He was also relying upon the other specific rights bestowed by the Faculty Manual before he could be denied tenure.

As this Court noted in Perry, 408 U.S. at 601:

> . . . "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." . . . A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. . . .

(citing Board of Regents v. Roth, 408 U.S. 564, 577) (emphasis added).

CONCLUSION.

The two decisions of the Fourth Circuit below in this case, No. 75-1372 involving the de facto tenure issue and No. 81-1069 involving the due process issue, are contrary to prior decisions of this Court and of other Circuit Courts of Appeal. The opinion on the due process issue creates unwarranted and unfortunate precedent, if not reviewed, to the effect that state institutions of higher learning do not have to abide by regulations bestowing rights, benefits, and entitlements on their faculty members, even where such regulations are part of an employment contract. If this is indeed the law, then faculty members at all state universities throughout the country are left to the whim

of university officials as to whether employment regulations will be followed or are merely an illusion. And it is cold comfort, as Dr. Kilcoyne has learned, to say that maybe employment contract rights can be enforced in the state courts on a breach of contract theory; for if the state law makes the university immune from a contract suit, there is no remedy at all in law or equity for the faculty member.

For these reasons, and for the others set out above, petitioner respectfully requests that this Court issue its writ of certiorari to review all decisions of the United States Court of Appeals for the Fourth Circuit previously handed down in this case.

Respectfully submitted,

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Appendix

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1069

Martin Joseph Kilcoyne,

Appellant,

v.

Robert Morgan, Chairman, Board of Trustees, East Carolina University, etc., et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Washington. John D. Larkins, Jr., District Judge.

Argued: June 3, 1981 Decided: November 27, 1981

Before BRYAN, Senior Circuit Judge, SPROUSE AND ERVIN, Circuit Judges.

Thomas F. Loflin, III (Loflin & Loflin on brief) for Appellant; Elizabeth C. Bunting, Assistant Attorney General (Rufus L. Edmisten, Attorney General, Edwin M. Speas, Jr., Special Deputy Attorney General on brief) for Appellees.

PER CURIAM:

The extent of the Fourteenth Amendment's role in faculty tenure and promotion procedures at State colleges and universities is questioned by this appeal. The facts of the immediate controversy follow.

I

During the academic years from July 1969 to May 1973, appellant Martin Joseph Kilcoyne was a non-tenured member of the faculty of East Carolina University (ECU), a member institution of the greater University of North Carolina. As stipulated by the parties, his employment contract with ECU incorporated the following provision of the Faculty Manual: "The Department Chairman will inform the non-tenured faculty member of his progress toward tenure both by personal conference and written resume." These University guidelines required a tenure decision on professors of Kilcoyne's rank following three probationary years of teaching at ECU.

Late in each of his first two academic years at ECU, Professor Kilcoyne received a letter from his department chairman.[1] Both letters followed a common formant. They began with an explanation that the letter was required by the University regulation just quoted. Next the chairman thanked Kilcoyne for his contributions to the University. The third paragraph of each letter stressed the need for him to publish his scholarly works. Both letters concluded with a request for a personal conference with Kilcoyne in the department chairman's office. Such a conference was held each year.

1. These letters were dated April 21, 1970 and May 22, 1971.

On September 20, 1971, the beginning of his third year, Kilcoyne was notified that he would be rehired for a fourth academic year. Before this third and final probationary year was completed, however, he was informed that he would not be granted tenure nor given employment beyond the fourth year. These communications from ECU prompted Kilcoyne's Section 1983[2] and pendent State claims, the subject of this litigation.

II

Kilcoyne's complaint, filed April 4, 1973 in the United States District Court for the Eastern District of North Carolina against the defendants alleges that ECU had granted him "de facto tenure" by hiring him for an additional year beyond the three-year probationary period for non-tenured faculty, and thus had violated his rights by discharging him without a hearing. The Court granted summary judgment against him on this point, Kilcoyne v. Morgan, 405 F. Supp. 828 (E.D.N.C. 1975); we affirmed, Kilcoyne v. Morgan, 530 F.2d 968 (CA4 1975). The cause, however, was remanded for the trial court's reconsideration of the procedural due process issues addressed in this

2. 42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

opinion. Kilcoyne v. Morgan, No. 75-1372 (CA4 March 3, 1976) (unreported supplemental opinion).

On remand, Kilcoyne now maintains that the procedures followed by ECU did not conform precisely to those in the Faculty Manual, and that this asserted deviation constitutes an actionable denial of due process by the State. The District Judge referred the cause to a Magistrate to determine "whether the conduct of the defendants amounted to a denial of procedural due process."

The Magistrate's Memorandum and Recommendation, filed January 10, 1980, concluded that Kilcoyne could not maintain a claim predicated on a denial of procedural due process. The District Court adopted the Magistrate's report in whole and, on January 29, 1980, again granted summary judgment against Kilcoyne. Subsequently, his pendent State claims against ECU for breach of contract also were referred to the Magistrate with similar results. On October 31, 1980, the District Court adopted the Magistrate's report and dismissed the pendent claims as well. Kilcoyne appeals these two rulings; we affirm.

III

Invocation of the Fourteenth Amendment's due process guarantees required Kilcoyne to show that the State had deprived him of a protected liberty or property[3] interest. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Failing to satisfy this prerequisite by establishing his

3. Kilcoyne raises only colorable claims of deprivation of property interests.

claim to "de facto tenure," Kilcoyne v. Morgan, 530 F.2d 968 (CA4 1975), he now argues that the impermissible deprivation supporting his Fourteenth Amendment claim is ECU's failure to follow the procedures for making tenure decisions required under his contract through incorporation of the Faculty Manual. More explicitly, he complains the procedures that ECU employed failed to comport exactly with these contractual requirements.

Far from disclosing a violation of his constitutional rights, Kilcoyne's complaint reveals that ECU provided procedural safeguards beyond the requirements of the Fourteenth Amendment. Because he lacked a right to further employment at ECU, his denial of tenure and further employment without any procedural safeguards would have been permissible under the Fourteenth Amendment. See Board of Regents v. Roth, 408 U.S. 564 (1972).

Had FCU gratuitously afforded tenure aspirants procedural safeguards not constitutionally mandated, deviations from those procedures would not support a claim under the Fourteenth Amendment and Section 1983. See, e.g., Clark v. Whiting, 607 F.2d 634, 642 (CA4 1979); Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 3 (CA7 1974). Kilcoyne maintains however, that ECU did not gratuitously provided procedural safeguards to non-tenured faculty; he argues instead that these procedures, admittedly exceeding the procedural due process requirements of the Fourteenth Amendment, were prescribed by the terms of his employment contract.

For Fourteenth Amendment purposes, Kilcoyne's contractual claim for additional procedural safeguards does not distinguish his case from those where the procedures were provided gratuitously. The contract may provide a basis for recovery under a breach of promise theory, but that issue

is not elevated to a constitutional question solely because the State is a party to the contract. As we have admonished repeatedly "[e]very disagreement between a public employee with his employer over. . . the terms of his contract does not reach constitutional proportions." Sigmon v. Poe, 564 F.2d 1093, 1096 (CA4 1977); accord, Heath v. City of Fairfax, 542 F.2d 1236, 1238 (CA4 1976).

IV

Kilcoyne's pendent State law claims pressed a cause of action for breach of contract. The District Court granted defendants' motion to dismiss these claims on the grounds that they were barred by the doctrine of sovereign immunity. The Supreme Court of North Carolina abrogated the doctrine of sovereign immunity in that State effective March 2, 1976. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976). As Kilcoyne's claim accrued prior to March 2, 1976, the dispositive question is whether the abrogation was to apply retroactively.

In MacDonald v. University of North Carolina, 299 N.C. 457, 263 S.E.2d 578 (1980), the North Carolina high court unequivocally announced that the rule in Smith v. State would not apply retroactively; all claims accruing prior to March 2, 1976 remained barred by the State's sovereign immunity. As MacDonald involved a suit against a constituent institution of the greater University of North Carolina, we find it wholly dispositive of the instant case. Kilcoyne's arguments to the contrary are meritless.

The judgments below are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION
#792-CIVIL

MARTIN JOSEPH KILCOYNE, Plaintiff	)	
v.	)	ORDER
THE UNIVERSITY OF NORTH CAROLINA, Defendant.	)	

LARKINS, SENIOR DISTRICT JUDGE:

THIS MATTER comes before this court upon the memorandum and recommendation of the Honorable Charles K. McCotter, Jr., United States Magistrate. Objections having been filed by counsel for plaintiff, this case is now before the court for de novo determination.

AFTER CAREFUL REVIEW OF THE RECORD IN THIS CASE, THE MAGISTRATE'S MEMORANDUM AND RECOMMENDATION, AND THE TIMELY OBJECTIONS FILED BY PLAINTIFF, IT IS THE OPINION OF THIS COURT THAT THE MAGISTRATE'S ANALYSIS IS WELL-FOUNDED AND CORRECT AND SHOULD BE ADOPTED AS THE ORDER OF THIS COURT. THEREFORE IN ACCORDANCE WITH THE RECOMMENDATION OF MAGISTRATE McCOTTER, THE COURT HAVING ACCEPTED THE MAGISTRATE'S MEMORANDUM IN WHOLE, THAT DEFENDANT'S MOTION TO DISMISS IS GRANTED. THIS ACTION IS HEREBY DISMISSED. THE CLERK IS DIRECTED TO ENTER JUDGMENT HERFON.

SO ORDERED, THIS THE 31 DAY OF OCTOBER, 1980.

/s/ John D. Larkins, Jr.
SENIOR DISTRICT JUDGE

AT TRENTON, NORTH CAROLINA

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION
No. 792-CIVIL

MARTIN JOSEPH KILCOYNE, Plaintiff	)	
v.	)	MEMORANDUM AND RECOMMENDATIONS
THE UNIVERSITY OF NORTH CAROLINA, Defendant.	)	

This matter is now before this Court on the defendant's Motion to Dismiss filed March 13, 1980. This case has a lengthy history in federal court dating back to April 4, 1973, when the plaintiff, an associate professor of history at East Carolina University, filed this action under Title 42 U.S.C. Section 1983, for wrongful termination of his employment. It suffices to say that the only claim remaining before the Court is that of breach of employment contract.

The basis of the defendant's Motion to Dismiss is that this claim is barred by the doctrine of sovereign immunity. In State v. Smith, 289 N.C. 303, 222 S.E.2d 412 (1976), the North Carolina Supreme Court held "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract" and "(T)hus, in this case, and in causes of action in contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State." at 320. In MacDonald v. The University of North Carolina, ____ N.C. ____ (No. 36, Spring Term 1980), the Supreme Court

reaffirmed "the conclusion of Smith in favor of a wholly prospective application of the abrogation of the doctrine of sovereign immunity." MacDonald was an action against the University of North Carolina for damages for breach of an employment contract with the cause of action accruing on August 31, 1974. In the case at bar, Kilcoyne's claim accrued in May of 1973 when his employment with the University ended. MacDonald v. University of North Carolina, supra. As the plaintiff's claim accrued prior to March 2, 1976, the doctrine of sovereign immunity would operate as a bar to plaintiff's action unless the defense of sovereign immunity had been waived as of the date his alleged cause of action had accrued. MacDonald v. The University of North Carolina, supra.

Plaintiff contends that N.C.G.S. 116-3, constitutes legislative waiver of the defense of sovereign immunity as applicable to the University of North Carolina. The University of North Carolina is established and defined in N.C.G.S. 116-1 et seq. The University's declared purpose is to foster, coordinate and improve the state's system of higher education. N.C.G.S. 116-1. To this end, it is made "a body politic and corporate . . . . able and capable in law to sue and be sued in all courts whatsoever; . . . . and in general may do all such things as are usually done by bodies corporate and politic, or such as may be necessary for the promotion of learning and virtue." N.C.G.S. 116-3 (1971).

The defendant asserts that the Court in MacDonald found Section 116-3 not to be a waiver of the defense of sovereign immunity, because the University of North Carolina was the defendant therein and the Court held the plaintiff's action to be barred by the doctrine of sovereign immunity. The extent of the Court's consideration of G.S. 116-3 does not appear from its decision.

However, the plaintiff did seek a Petition for Rehearing, asserting that the Court overlooked the points of law raised by G.S. 116-1 et seq. This petition was denied without comment. Guidance, however, can be taken from the words of Justice Britt in the Court's decision where, in discussing the legal theory pursued by plaintiff, he stated "(I)n short, plaintiff elected to seek relief on a theory as to which the defense of sovereign immunity had not been waived or abrogated as of the date that his alleged cause of action had accrued."

This Court interprets this language to mean that as of the date of accrual of MacDonald's claim for relief, August 31, 1974, the defense of sovereign immunity had not been waived or abrogated. As Section 116-3 was in effect on August 31, 1974, it appears that the North Carolina Supreme Court did not construe G.S. 116-3 as effectuating a waiver of sovereign immunity. As Kilcoyne's claim for relief accrued in May 1973, this case is indistinguishable from MacDonald and the defendant's Motion to Dismiss should be ALLOWED and this action DISMISSED.

This the 26th day of September, 1980.

/s/ Charles K. McCotter, Jr.
UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION
NO. 792-CIVIL

MARTIN JOSEPH KILCOYNE, Plaintiff,	)	
	)	ORDER
ROBERT MORGAN, et al., Defendants.	)	

LARKINS, SENIOR DISTRICT JUDGE:

THIS MATTER COMES before this Court upon the Findings and Recommendations of the United States Magistrate, Charles K. McCotter. Objections to the Magistrate's Memorandum and Recommendation having been filed, this Court must, pursuant to 28 U.S.C. §636(c), make a de novo determination on the issues herein placed before the Court.

The Court has fully reviewed the record of the case, the Magistrate's Memorandum and the Objections filed by plaintiff and defendants. After complete re-examination, it is the determination of the Court that the Findings and Recommendations of the Magistrate are accurate and well-founded and should be adopted as the ruling of this Court.

NOW, THEREFORE, IT IS ORDERED THAT THE MEMORANDUM AND RECOMMENDATIONS OF THE MAGISTRATE IS HEREBY ACCEPTED AND ADOPTED IN WHOLE. OBJECTIONS FILED ON BEHALF OF THE PLAINTIFF AND DEFENDANTS ARE OVERRULED.

FURTHER, IN ACCORDANCE WITH THE RECOMMENDATIONS OF THE MAGISTRATE, THE FOLLOWING IS ORDERED, ADJUDGED AND DECREED:

(1) THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO THE DUE PROCESS CLAIM IS GRANTED.

(2) THE BREACH OF CONTRACT CLAIM SHOULD BE SET FOR TRIAL AS MANDATED BY THE FOURTH CIRCUIT.

(3) THE STATE OF NORTH CAROLINA SHALL BE ADDED AS DEFENDANT AND THIS ACTION SHALL BE DISMISSED AS AGAINST DEFENDANT'S MORGAN, FRIDAY, JENKINS, WILLIAMS AND PASCHAL.

(4) THE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IS STRICKEN.

LET THIS ORDER BE ENTERED FORTHWITH.

/s/ John D. Larkins, Jr.
SENIOR DISTRICT JUDGE

AT TRENTON, NORTH CAROLINA
JANUARY 29, 1980

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION
No. 792-CIVIL

MARTIN JOSEPH KILCOYNE,
Plaintiff

v.

ROBERT MORGAN, Chairman, Board of Trustees, East Carolina University, in his official capacity; WILLIAM FRIDAY, President, University of North Carolina, in his official capacity; LEO JENKINS, Chancellor, East Carolina University, Individually and in his official capacity; ROBERT W. WILLIAMS, Provost. East Carolina University, Individually and in his official capacity; and HERBERT R. PASCHAL, Chairman, Dept. of History, East Carolina University, Individually and in his official capacity,
Defendants.

MAGISTRATE'S MEMORANDUM AND RECOMMENDATION

The plaintiff, an associate professor of history at East Carolina University, commenced this action on April 4, 1973, under Title 42 U.S.C. Section 1983 for the wrongful termination of his employment claiming tenure and failure of the defendants to follow their own regulations. In a Memorandum Opinion and Order filed on February 5, 1975, District Judge John D. Larkins, Jr. granted the defendants' motion for summary judgment holding that the plaintiff had neither achieved tenure nor been deprived of constitutional rights. Kilcoyne v. Morgan, 405 F. Supp. 828 (E.D.N.C. 1975). The plaintiff appealed this decision to the Fourth Circuit Court of Appeals and

in the first opinion of that court, the trial court's order was affirmed in all respects. Kilcoyne v. Morgan, 530 F.2d 968 (4th Cir. 1975). However, in a Supplemental Opinion following a petition to reconsider, the Court split its decision on the two issues of the case. Kilcoyne v. Morgan, (4th Cir. 1976), unpublished opinion). It again affirmed the findings of the district court with regard to the de facto tenure question, but remanded on the issue of failure to follow regulations. The Fourth Circuit held that "Mr. Kilcoyne did not obtain and has never had tenure at East Carolina University;" however, the Court found unresolved material issues of fact as to the claim of failure of the university to comply with its own rules. The Circuit Court remanded "for trial to determine whether officers of the university breached its employment contract with Kilcoyne." The district court was also instructed to "also consider whether the conduct of the defendants amounted to a denial of procedural due process."

On July 31, 1979, the defendants filed a motion for summary judgment contending that the action of the defendants does not constitute a violation of due process and that the court is without jurisdiction to determine the pendent breach of contract claim. The defendants further contend that any award of damages is barred by the Eleventh Amendment.

Law of the case applies and this matter is ready for trial on the issue of breach of contract. Where an appellate court has decided an issue, the inferior court is bound by the decree as the law of the case. In Mid-Eastern Electronics, Inc. v. First National Bank of Southern Maryland, 455 F.2d 141, 143 (4th Cir. 1970) the Fourth Circuit noted:

"As stated in Ex Parte Sibbald, 12 Pet. 488 (1838), 92 L.Ed. 1167, '(W)hatever was

> before the court, and is disposed of, is considered finally settled. The inferior court is bound by the decree as the law of the case; . . . They cannot vary it, or examine it for any other purpose than execution.' id. at 492; see also Munro v. Post, 102 F.2d 686 (2nd Cir. 1939)."

Law of the case is further explained in the recent case of Riley v. Meba Pension Trust, 586 F.2d 968, 970 (2nd Cir. 1978):

> "(W)e have said that the law of the case 'when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of the case, applied to everything decided, either expressly or by necessary implication,' Munro v. Post, 102 F.2d 686, 688 (2nd Cir. 1939)."

The unresolved question of fact to be decided by a jury is whether the officers of East Carolina University substantially failed to follow its employment regulation contained in the faculty manual which is part of the contract of employment of every member of the faculty at East Carolina University, thus constituting a breach of contract.

The Fourth Circuit also directed inquiry into whether the conduct of the defendants amounted to a denial of procedural due process. In this regard it is important to note that Appendix B, Section IV, Par. A to the Faculty Manual of East Carolina University establishes the following evaluation procedure of faculty members:

> A. Procedures for the Evaluation of Faculty
>
> The Deans of the various Colleges or Schools and the Chairmen of Departments

will develop a systematic procedure for the annual evaluation of faculty members, especially in the case of those members who do not have tenure. Such an evaluation procedure should be constructed upon the following principles: (1) objective criteria upon which evaluations are undertaken will be publicized; (2) the Dean and Chairmen will institute means that permit faculty members to report their achievements year by year; (3) records and reports will be on file in each departmental office to serve as objective evidence in support of promotions, salary increases, the grant of tenure or in support of decisions against promotions, salary increases, and the grant of tenure; (4) faculty members have the right to discuss their status with the Department Chairmen and Deans at any time.

Paragraph B of Section IV provides:

B. Guide for Evaluation of Faculty by Chairmen

The Chairman's evaluation shall include all factors the Chairman may consider pertinent. Recommendations shall be based on definite statements accompanied by supporting evidence, including statements describing wherein and in what manner the faculty member does not meet expected performance.

A professional staff member may be deficient in one or several pertinent aspects, and yet be highly useful and valuable member of the staff; on the

> other hand, a professional staff member may rate very highly in some respects, yet be generally a detriment to the University. It is the total makeup and performance of the individual that is significant, rather than a summation of discrete factors which might obscure this totality. Therefore, exercise of the most careful judgment is required in order to maintain demonstrable objectivity in an overall evaluation.

The plaintiff claims that during the entire time he was on the faculty as an Associate Professor of History he performed his duties competently and satisfactorily. The plaintiff was notified that he would not be retained on the faculty of the University after May, 1973, nor would be given tenure. Plaintiff contends that the notification and procedure in which the decision was made not to award him tenure and not to retain him on the faculty failed to follow the detailed requirements for due process as required by the Faculty Manual of East Carolina University. Plaintiff claims that the defendant Paschal did not inform him at any time of his progress toward tenure by oral conference or written resume; that the defendants did not maintain a file of records and reports constituting demonstrable objective evidence as required by the Faculty Manual on which to base a decision not to award him tenure and retain him on the faculty; that the evaluation of the plaintiff by the defendants Jenkins, Williams and Paschal failed to satisfy the Faculty Manual requirement of demonstrably objective reasons for discharging him and not awarding him tenure. The plaintiff seeks reinstatement as the Associate Professor of History, compensatory damages against the individual defendants Jenkins, Williams, and

Paschal, jointly and severally, in the amount of $197,400 and $200,000 and punitive damages.

The question in this instance is whether the failure of the officials of East Carolina University, a public institution, to follow its own rules constitutes a denial of due process.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of Liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Property interests are created and defined by existing rules or understandings that stem from an independent source and as state law. Board of Regents v. Roth, supra; Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). Unilateral expectations are not sufficient and an indefinite or abstract need or desire for the benefit does not trigger the Fourteenth Amendment procedures. See Bishop v. Wood, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976); Board of Regents v. Roth, supra.

Further, the benefit itself must be a substantial one; that is, it must truly be a valuable guarantee. In employment cases, this translates into a right to employment. Terms and conditions of employment are not generally protectable property rights. See for example Sigmon v. Poe, 564 F.2d 1043 (4th Cir. 1977). Indeed, the leading Supreme Court cases in the employment area by implication buttress this position. See Board of Regents v. Roth and Perry v. Sindermann, supra. (See also Leis v. Flynt, 437 U.S. 438, 58 L.Ed.2d 717, 99 S.Ct. (January 15, 1979), where the Supreme Court implied that the identification of a property right rests on the substance of the benefit claimed.)

This Court has already determined that the plaintiff had no right to continued employment and the Fourth Circuit explicitly affirmed this finding. Thus, the plaintiff can show no property right coincident with his employment sufficient to draw the Fourteenth Amendment into play. The rules which the plaintiff claims have been violated are minor matters of no substance in a property rights context. Since the Fourteenth Amendment protects against deprivation of substantial benefits, plaintiff has not stated a claim for relief and this action must be dismissed.

Several recent cases have considered the question of whether written reasons for a contract nonrenewal are a requirement of due process. In Ryan v. Aurora City Board of Education, 540 F.2d 222 (6th Cir. 1976), the Board of Education had regulations requiring that written reasons be given to teachers whose contracts were not renewed. The plaintiff teachers received a notice of nonrenewal, but no reasons for the action were given. The Board's failure to follow its own regulations was alleged by plaintiffs as a denial of due process, the claim being that there was a property interest in having the regulations followed. In dismissing the complaint, the Court noted first that the plaintiffs had no right to continued employment. Thus, they could not show an entitlement giving rise to a property right. In further explaining its reasoning, the Court found the following quote from Jeffrie v. Turkey Run Consolidated School District, 492 F.2d 1, 3-4 (7th Cir. 1974), to be particularly persuasive:

> " ' (since) no constitutionally protected property or liberty interest of the teacher is impaired by the Board's action, she

> has no federally protected right to a fair hearing or a fair statement of reasons. The fact that a state, or a school board may voluntarily communicate more information to her, or receive more information from her, than the Constitution requires, is not in itself sufficient to create a federal right that does not otherwise exist.' " (emphasis their's)

Finally, the Ryan court noted that issues concerning regulations and written reasons were matters of state law and should only be considered by state courts. The only issues cognizable in a federal court were those of a constitutional magnitude and plaintiff's complaint was a good distance from this threshold.

The Fourth Circuit dealt with a similar issue in Sigmon v. Poe, supra. Finding no due process violation in a school board's failure to give reasons, a dismissal was ordered. In summing up its holding, the Court emphasized: "Every disagreement between a public employee over matters of state law or the terms of his contract does not reach constitutional proportions." 654 F.2d at 1096. And this case retains particular significance since it came down after the Fourth Circuit decision in the case at bar.

Another collection of cases concern the terms and conditions of employment and in each case a distinction was made between a guarantee to continued employment and a disputed condition or contract provision incident to that employment. The various courts noted that while a property right existed in the former situation, no such entitlement was evidencedin the latter. In Berry v. City of Portsmouth, 562 F.2d 307 (4th Cir. 1977), a

city ordinance provided for disability retirement benefits. When plaintiffs were denied the full range of insurance benefits, they brought suit claiming that the ordinance provided the necessary guarantee; and thus, the deprivation concerned "property." The Court disagreed, finding no constitutional protectable property interest in the retirement fund.

The Fourth Circuit faced a similar situation in Heath v. City of Fairfax, 542 F.2d 1236 (4th Cir. 1976) where a city ordinance provided for salary increases in certain situations. The plaintiffs' suit, alleging a property right to the increases, was dismissed; the Court again holding that no Fourteenth Amendment property right existed. It is important to recognize that both the Berry and Heath cases concerned regulations incident to employment and resulted in dismissals, the Court finding no property right in having the particular regulation followed. Also worthy of noting is the fact that both cases concerned important terms of employment: fringe benefits and salary increments. Viewed in this light, the provisions at issue in the case at bar, a written resume and a conference, seem even further removed from a property right identity. If no property right exists in the fringe benfits and salary increment area, then surely none exist here.

Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976), is of particular importance here because of its factual similarity to the case at bar. There a faculty handbook set out procedures for the dismissal of tenured faculty. Under these regulations, the faculty member was entitled to a hearing before a faculty

committee and a subsequent "review of the record" by the board of regents. Plaintiff, a tenured faculty member, was dismissed and subsequently afforded a hearing before the faculty committee. However, no review by the board of regents was undertaken, and the plaintiff claimed this breach violated the Fourteenth Amendment. The Sixth Circuit disagreed and reasoned as follows:

> "It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional process of state institutions."
> 547 F.2d at 329-330.

The case at bar presents for decision the propriety of federal review under Section 1983 on due process grounds the denial of academic tenure and employment by a university. Absent impermissible sex or racial discrimination or First Amendment restraints, the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979). Failure to comply with Section IV of the Faculty Manual does not appear to violate a constitutional requirement that one subjected to such violation will have a remedy under Section 1983. The federal judiciary is not the appropriate forum for decision involving academic rank and tenure. "A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective

standards." Lewis v. Chicago State College, 299 F.Supp. 1357, 1359 and 1360 (N.D. Ill. 1969). In Chung v. Park, 514 F.2d 382, 387 (3rd Cir. 1975), the Court said:

> "Moreover, the administration of the interal affairs of a college and the determination of professional competency is a matter peculiarly within the discretion of a college administration.
>
> Due process should not be employed to insure that this exercise of discretion is 'wise' but only that it is not unreasonable, arbitrary or capricious. If the procedure used by the college is adequate to prevent unreasonable, arbitrary or capricious termination decisions, it satisfies due process."

In Clark, supra, at p. 11-13, Judge Russel said:

> "A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests. These determinations are in "an area in which school officials must remain free to exercise their judgment" especially since these determinations present unique questions for judgment by those with expertise in the specialized academic area, capable of making professional evaluations of those elusive and intangible qualities and talents expected of the scholar and teacher. Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts on faculty promotions or to engage

> independently in an intelligent informal comparison of the scholarly contributions or teaching talents of one faculty member granted a promotion; in short, courts may not engage in "second-guessing" the University authorities in connection with faculty promotions."

Although pertinent to the contractual issue, failure to comply with the rule requiring an annual resume and an annual conference disclosing progress toward tenure is not of constitutional dimension. While it remains an unresolved question of fact as to whether Kilcoyne was provided with an anual resume or personal conference, such is not material to the due process claim. The Fourth Circuit even found that "(t)he gist of each letter is that Dr. Paschal was aware of how Kilcoyne was doing."

Dr. Paschal testifies in his affidavit as follows:

> "As the guide provides, I did in the case of Professor Kilcoyne consider all factors that I considered pertinent. This included oral statements made to me by other faculty members, by students, and by Professor Kilcoyne himself. These oral statements were supported by all pertinent information available to me in written form. Also available to me, of course, were my own observations and knowledge as well as my experience as a faculty member and as chairman of the Department of History. I weighed carefully the opinion of the department's committee on tenure composed of some of the department's most mature professors. I agree completely with the Faculty

> Manual on p. 92 that the 'exercise of the most careful judgment is required in order to maintain demonstrable objectivity in an overall evaluation.' I used all of my capacity, experience, and knowledge in considering and deciding upon whether or not to grant Professor Kilcoyne tenure."

In a letter dated April 11, 1972, addressed to Dr. Paschal and signed by Richard Todd, the Chairman of the History Department's committee on tenure states:

> "This letter is being written to advise you that the History Department's Committee on Tenure has thoroughly reviewed the records of Dr. Martin J. Kilcoyne, Associate Professor, and recommends that he be denied tenure."

See also affidavits of Professor Joseph F. Steelman, Richard C. Todd, and Charles L. Price. That by letter dated April 20, 1972, addressed to the plaintiff and signed by Leo Jenkins, Chancellor of East Carolina University, the plaintiff was advised that he would not be granted tenure and would not be employed beyond the 1972-73 academic year:

> "In accordance with the University Provisions Regarding Tenure and Academic Due Process as they appear in the 1971-73 Faculty Manual and upon recommendation of your department chairman and dean, I am notifying you herewith that you will not be granted tenure or employment beyond the academic year 1972-73."

It is therefore apparent that the school

officials deliberated and made professsional evaluations to some extent as to the retention of Dr. Kilcoyne. It appears that these determinations are in "an area in which school officials must remain free to exerdise their judgment" and make professional evaluations of the "intangible qualities and talents expected of the scholar and teacher." These constitute discretionary judgments on faculty promotion or tenure which the courts are hesitant to review or engage in second-guessing. Clark v. Whiting, supra. There is no basis in this case to support the plaintiff's claim of violation of due process and, therefore it is the Magistrate's recommendation that the defendants' motion for summary judgment be granted as to the due process claim.

The defendants contend that without the due process claim, the court lacks jurisdiction to try the breach of contract claim. This contention is without merit for two reasons. First, as already discussed, it is the mandate of the Fourth Circuit that the district court try the breach of contract claim. Secondly, although the constitutional claim should be dismissed upon summary judgment, the Court has the power in its discretion to hear the pendent claim. United Mine Workers of America v. Gibbs, 383 U.S. 175, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). In United Mine Workers, at p. 725-726, the Court said:

> "Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . .,' U.S. Const., Art. III, Sec. 2, and the relationship between that claim and the state claim permits the

> conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.
>
> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64."

Kilcoyne's federal and pendent state claims arise from a common nucleus of operative facts and are such that should be tried all in one judicial proceeding. Bowman v. Hartig, 334 F.Supp. 1323 (D.C.N.Y. 1971). The adverse decision of the federal claim in summary judgment does not defeat the pendent jurisdiction. In re Union National Bank & Trust Co. of Sauderton,

Pennsylvania, 298 F.Supp. 422 (D.C.Pa. 1969).

The breach of contract claim should be set for trial as mandated by the Fourth Circuit. However, it appears that the present party defendants are not the real parties in interest as there are no factual allegations that would make them parties to the plaintiff's employment contract. Under North Carolina law Kilcoyne has not stated his claim for breach of contract against the individual defendants. Smith v. State, 289 N.C. 302, 222 S.E.2d 412 (1976). As East Carolina University is defined as a constituent institution of the University of North Carolina under Chapter 116 of the North Carolina General Statutes, the State of North Carolina is the real party in interest in this litigation. Robertson v. Dale, 464 F.Supp. 680 (M.D.N.C. 1979). "(W)hen an action for breach of contract to recover lost benefits is brought against the state, and the officials who acted for the state in the transaction which is the basis for this suit, the State alone will be liable a plaintiff must state and prove more than a claim for breach of contract." Smith v. State, supra, at 332. [sic]

Therefore, it is the Magistrate's recommendation that the State of North Carolina be added as a defendant to this action as being the real party in interest and that this action be dismissed against the defendants Morgan, Friday, Jenkins, Williams and Paschal.

The defendants have raised the issue of sovereign immunity as a bar to the award of damages against the state in an action for breach of contract. As the State of North Carolina is not yet properly before the Court, consideration of this issue is premature at this time. However, the Court is cognizant that in

Smith v. State, supra, the Supreme Court of North Carolina held that in a cause of action in contract arising after March 2, 1976, the date of the Supreme Court opinion, the doctrine of sovereign immunity will not be a defense to the State. If the Eleventh Amendment is raised by the State, the Court shall then have to determine the applicability of the Smith decision.

Further, the Magistrate recommends that the plaintiff's claim for punitive damages be striken as such are not recoverable under North Carolina law for breach of contract. King v. Insurance Co. of North America, 273 N.C. 396, 159 S.E.2d 891 (1968).

This the 10th day of January, 1980.

/s/ Charles K. McCotter, Jr.
UNITED STATES MAGISTRATE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 75-1372

Martin Joseph Kilcoyne,
Appellant,

v.

Robert Morgan, Chairman, Board of Trustees, East Carolina University, in his official capacity; William Friday, President, University of North Carolina, in his official capacity; Leo Jenkins, Chancellor, East Carolina University, Individually and in his official capacity; Robert W. Williams, Provost, East Carolina University, Individually and in his official capacity; and Herbert R. Paschal, Chairman, Dept. of History, East Carolina University, Individually and in his official capacity,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern

---

Upon consideration of the appellee's petition for rehearing, by counsel,

IT IS ORDERED that the state's petition for rehearing is denied without prejudice to the right of the state to present the arguments made in its petition for rehearing to the district court.

For the Court - By Direction

/s/ William K. Slate, II
CLERK

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 75-1372

Martin Joseph Kilcoyne,
Appellant,

v.

Robert Morgan, Chairman, Board of Trustees, East Carolina University, in his official capacity; William Friday, President, University of North Carolina, in his official capacity; Leo Jenkins, Chancellor, East Carolina University, Individually and in his official capacity; Robert W. Williams, Provost, East Carolina University, Individually and in his official capacity; and Herbert R. Paschal, Chairman, Dept. of History, East Carolina University, Individually and in his official capacity,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. John D. Larkins, Jr., District Judge.

SUPPLEMENTAL OPINION ON PETITION TO REHEAR

Before CRAVEN, BUTZNER, and WIDENER, Circuit Judges.

Thomas F. Loflin, III (Loflin and Loflin on brief) for Appellant; Edwin M. Speas, Jr., Assistant Attorney General of North Carolina, (Rufus L. Edmisten, Attorney General of North Carolina, on brief) for Appellee.

Filed: March 3, 1976

PER CURIAM:

In our prior unpublished opinion we affirmed the entry of summary judgment for defendants for the reasons stated by the district judge. On the petition to rehear, able counsel for Kilcoyne convinces us there were material issues of fact unresolved by affidavits. We grant the petition and withdraw our prior opinion.

With respect to the question of tenure, we adopt that portion of the opinion of the district court dealing with the question as our own. We agree with the district judge that rehiring Kilcoyne for an extra year did not result in tenure, because the granting of it had been specifically denied prior to the expiration of the probationary period. There is nothing in the faculty manual that prohibits the employment of an untenured teacher beyond the expiration of his probationary period. We hold that such an appointment does not result in automatic tenure, and that Mr. Kilcoyne did not obtain and has never had tenure at East Carolina University.

But that is not the end of the litigation. Kilcoyne claims that even without tenure he was

entitled to have the university comply with its own rules, and specifically the rule requiring an annual resume and an annual conference that would disclose to him his progress toward achieving tenure. Form letters were sent Kilcoyne. Vol. I, Appellant's Brief, at 63A and 64A. Whether either of them constitutes a "resume," as required by the faculty manual, is an unresolved question of fact. The gist of each letter is that Dr. Paschal was aware of how Kilcoyne was doing. But neither letter discloses progress to Kilcoyne. The letters suggest there will be disclosure in an interview. But the affidavits of the parties as to what occurred at the personal conference, also required by the faculty manual, are either conflicting or favorable to Kilcoyne. Dr. Paschal's affidavit does not disclose what was said. Kilcoyne's affidavit is to the effect that Dr. Paschal never expressed any displeasure, either orally or in writing, about failing to publish or poor performance in any other area. The district court erroneously accepted Dr. Paschal's affidavit that an annual written resume and an annual personal conference had been granted without mentioning the counter affidavits of Kilcoyne and Kilcoyne's other affiants, and without deciding whether what was done was a sufficient compliance with the university's own regulations.

We therefore vacate the judgment below and remand for trial to determine whether officers of the university breached its employment contract with Kilcoyne. The district court should also consider whether the conduct of the defendants amounted to a denial of procedural due process. Depending upon its findings, the court will then proceed to ascertain what relief, if any, Kilcoyne may be entitled to have.

AFFIRMED IN PART,
VACATED AND REMANDED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1372

Martin Joseph Kilcoyne,
Appellant,

v.

Robert Morgan, Chairman, Board of Trustees, East Carolina University, in his official capacity; William Friday, President, University of North Carolina, in his official capacity; Leo Jenkins, Chancellor, East Carolina University, Individually and in his official capacity; Robert W. Williams, Provost, East Carolina University, Individually and in his official capacity; and Herbert R. Paschal, Chairman, Dept. of History, East Carolina University, Individually and in his official capacity,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. John D. Larkins, Jr., District Judge.

(Argued November 11, 1975 Decided December 11, 1975)

Before CRAVEN, BUTZNER and WIDENER, Circuit Judges.

Thomas F. Loflin, III (Loflin & Loflin on brief) for Appellant; Edwin M. Speas, Jr., Assistant Attorney General of North Carolina, (Rufus L. Edmisten, Attorney General of North Carolina, on brief) for Appellee.

PER CURIAM:

For the reasons stated by the district judge the judgment entered below will be

AFFIRMED.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION
NO. 792 CIVIL

MARTIN JOSEPH KILCOYNE, Plaintiff,
v.
ROBERT MORGAN, Chairman, Board of Trustees, East Carolina University, et al., Defendants.

MEMORANDUM OPINION AND ORDER

LARKINS, District Judge:

I.

Plaintiff, an associate professor of history at East Carolina University, brought this suit under Title 42, U.S.C. Section 1983 for wrongful termination of his employment. Specifically, he alleges that he is a tenured professor and the defendants did not follow the detailed requirements for discharge of tenured faculty members specified by University regulations. He claims he has suffered embarrassment and injury to his professional good name, reputation, and standing among the academic community, has had imposed upon him a stigma of incompetency, and has wrongfully been deprived of his tenure and right to continued employment. He contends that such discharge will irreparably injure him and therefore seeks an injunction to enjoin defendants from replacing him on the East Carolina staff, an order reinstating him as associate professor, and damages in the amount of $397,400.00. The defendants moved to dismiss or in the alternative to abstain, and

both motions were denied by the Court in an order dated July 5, 1973. Also, by order dated October 29, 1973, the Court denied plaintiff's motion for a preliminary injunction.

Defendants now move for summary judgment and contend that the complaint fails to state a cause of action.

II.

The applicable facts are as follows: In the summer of 1969 the plaintiff taught a summer session at East Carolina. That fall he started his first year as a full time member of the faculty (1969-1970 school year). He was then, and has at all times since then been an associate professor. Plaintiff continued as a full time faculty member for the 1970-1971 school year, the 1971-1972 school year, and the 1972-1973 school year. In a letter dated September 20, 1971 from defendant Dr. Jenkins to plaintiff, he was reemployed for the 1972-1973 school year, his fourth year at East Carolina. The letter read:

> "In accordance with the University Provisions regarding Tenure and Academic Due Process as they appear in the Faculty Manual, I am this date notifying you that you will be re-employed for the academic year 1972-1973 at your present salary plus whatever increment is recommended and approved for you for that year.
>
> This letter constitutes my notice to you of the terms of your continued employment. I trust that you will notify me as soon as possible if you decide not to be with us during the academic year 1972-73. I call

your attention to the Faculty Manual, Appendix C, Section D.

This letter is not a notification of tenure. As you know, under the current tenure policy, notification of tenure must be made by the end of the third year for those in the top two professional ranks and by the end of the fifth year for the lower two ranks. Notification of reemployment is given according to the schedule in Appendix C, Section B of the Faculty Manual."

On April 20, 1972, Dr. Jenkins again wrote the plaintiff informing him that he would not be granted tenure and that his employment would be terminated at the end of the 1972-1973 school year. The letter read:

"In accordance with the University provisions Regarding Tenure and Academic Due Process as they appear in the 1971-1973 Faculty Manual and upon recommendation of your department chairman and dean, I am notifying you herewith that you will not be granted tenure or employment beyond the academic year 1972-1973.

Please let me take this occasion to thank you for all of your past services and to wish you success in the further pursuit of your career."

III.

Appendix B of the Faculty Manual is entitled

"Personnel Policy and Procedure for the Faculty." Paragraph G of Section I of Appendix B, which appears on page 88 of the Faculty Manual, provides as follows:

> "Appointments without tenure are probationary. Each faculty member without tenure shall be notified in writing by the President whether or not he will be rehired for the following year according to the schedule below:
>
> March 1 for the first year
> December 15 for the second year
> One full academic year thereafter
>
> The decision regarding retention of a non-tenured faculty member will be made by the Department Chairman after such consultation with members of the faculty and the Dean of the College or School as he shall deem appropriate in each case. The Department Chairman annually will inform the non-tenured faculty member of his progress toward tenure both by personal conference and written resume."

Appendix C of the Faculty Manual is entitled "Provisions Regarding Tenure and Academic Due Process." It provides in pertinent part at Section I, Paragraph B, which appears on page 94:

> "After the expiration of a probationary period (instructors and assistant professors five years, associate professors and professors three years), full-time faculty members have tenure, and their services will be terminated only for adequate cause. It is the

prerogative of the President to shorten this probationary period of faculty members at his discretion. Each faculty member without tenure shall be notified in writing by the President whether or not he will be rehired for the following year according to the schedule below:

March 1, the first year
December 15, the second year
One full academic year thereafter"

The parties have agreed by stipulation of facts tha the Faculty Manual is a part of the contract of employment of every member of the faculty at East Carolina University.

Plaintiff asks the Court to read the above-quoted paragraph of Appendix C to mean that when Professor Kilcoyne was rehired for his fourth full term as associate professor and when he returned for that fourth full term, he had tenure. Therefore, he could only have been dismissed for cause. The defendants interpret this clause differently. They claim that Professor Kilcoyne was rehired one full year in advance pursuant to the regulations for members without tenure. They argue that such rehiring did not automatically grant tenure, and that tenure was not awarded until the end of the probationary period unless the probationary period was shortened by the President.

The Court accepts the defendants' conclusion, that the rehiring for an extra year did not automatically grant tenure, when tenure had been specifically denied before the expiration of the probationary period.

In September, 1971, at the beginning of

plaintiff's third full year at East Carolina, he was notified of his continued employment for his fourth year (1972-1973). So that no misunderstanding would arise, however, Dr. Jenkins specifically stated that the letter of rehiring was not notification of tenure and that notification of tenure must be made by the end of the third year for associate professors. On April 20, 1972, prior to plaintiff's completion of his third full year and prior to his getting tenure, he was notified that he would not be granted tenure and that employment would be terminated at the close of the 1972-1973 academic year. Thus, the plaintiff had clearly not completed the probationary period requisite to receiving tenure when he was notified of his dismissal.

There is no provision in the Faculty Manual that no faculty member can be employed without tenure beyond the expiration of his probationary period. Indeed, Paragraph G of Section I of Appendix B of the Faculty Manual specifically states: "Appointments without tenure are probationary."

The Court is therefore of the view that the plaintiff has never had tenure at East Carolina University; and accordingly, he has no property right to continued employment. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 1972).

The Chairman of the History Department, Dr. Paschal, did request that the senior members of the history faculty, who made up the Tenure Committee of the History Department, give him their recommendations regarding Professor Kilcoyne's tenure (see Affidavits of Dr. Paschal and Professors Steelman, Todd and Price). Dr. Paschal's affidavit shows that both the annual written resume and the annual

personal conference was granted Professor Kilcoyne while he was on the faculty.

The procedures for the determination of tenure set forth in Paragraph A of Section IV of Appendix B of the Faculty Manual, found on pages 91-92, were complied with by Dr. Paschal. He has outlined the criteria which are used in making tenure decisions in his answers to plaintiff's interrogatories. In his affidavit, Dr. Paschal states that faculty members in the History Department are given the opportunity, at least annually, to report their achievement to the Chairman. He has kept a file of all reports and records relevant to his decision to deny tenure to the plaintiff. He afforded Professor Kilcoyne the opportunity to discuss any problems which might arise during his employment. Although Dr. Paschal never specifically set forth in writing his reasons for denying tenure, the Court has found no requirement in the Faculty Manual that written reasons be formulated or that a non-tenured professor be given written reasons.

The Court has no reason to question the adequacy of the reasons for denial of tenure. The plaintiff has provided the Court with no facts which would support the argument that plaintiff's constitutional rights were violated in the denial of tenure. Absent a showing of the denial of constitutional rights, subtle reasons for nonretention, which only have minimal factual support should be respected by the Court. Holliman v. Martin, 330 F.Supp. 1 (W.D.Va. 1971).

In this case, the one year's notice of non-retention was fair.

Accordingly, it is ordered that plaintiff's

motion for summary judgment be denied and defendant's motion for summary judgment be allowed.

/s/ John D. Larkins, Jr.
UNITED STATES DISTRICT JUDGE

Trenton, North Carolina
February 4, 1975

Appendix B

PERSONNEL POLICY AND PROCEDURE FOR THE FACULTY

1. *Selection and Appointment of New Faculty*

This section deals with the authority and responsibility for the selection and appointment of full-time, regular faculty members of East Carolina University holding the rank of Instructor, Assistant Professor, Associate Professor, or Professor. Statements in this section do not apply to special faculty appointments, such as Visiting Professor, Lecturer, Instructional Assistant, and all short-term, part-time, or temporary appointments, which are governed by the terms of the individual contracts. Notices of appointments and contracts of employment are subject to regulations on academic freedom and academic tenure and due process contained in the East Carolina University *Faculty Manual*. (See Parts I and IV; also, Appendix C.)

A. *Determination of Number and Nature of Positions Needed*

The Department Chairman (or his equivalent) is responsible for recommending to the Dean of his respective College or School the number and the nature of positions needed to carry on the functions of teaching and research within the Department at a level commensurate with the standards of academic performance prescribed by the Administration of the University. To assure himself, his staff, and his administrative superiors that he has made his recommendations with the guidance and support of the faculty of his department, the Chairman will, whenever possible, employ formal and informal procedures involving his faculty in the making of decisions of this nature. Deans of the various Colleges or Schools will act upon the recommendations of the Department Chairmen and approve, reject, or amend these recommendations before transmitting them to the Provost. (The Deans of the various Colleges or Schools will submit to Department Chairmen explanations for changes in the recommendations of the various Departments.)

B. *Selection of Candidates*

The Department Chairman, upon written authorization from the Dean of his respective College or School, will notify his faculty of the number and ranks of positions available, and with the Dean of his College or School becomes responsible for initiating and carrying out the search for candidates.

C. *Nomination of Candidates*

The Department Chairman is ultimately responsible for the nomination of candidates. However, the Chairman should realize his need for guidance and support from his faculty in such an important matter as recruitment of staff. He will utilize the counsel of his faculty through procedures both formal and informal in nature.

D. *Appointment*

Appointment to a position on the departmental faculty is made by the President and confirmed by the Board of Trustees. The Department Chairman is responsible for appropriate notices to the appointee regarding his teaching or research assignments, text book orders, office space, and other pertinent information.

E. *Terms of Employment*

The written notification of appointment will specify the terms and conditions of employment. Any special understandings, promises, or conditions not included in the notification of appointment, as approved by the President, will not be considered by the University as part of the contract of employment. Arrangements as to service expected will be made between the candidates and Dean or Department Chairman.

To facilitate a uniformity of employment throughout the University community a summary letter, an original and a copy, will be sent by the appropriate Dean or Department Chairman, along with the Faculty Personnel Recommendation (yellow) Form, to the Provost. After the approval of the appointment by the various Deans and the President of the University, a copy of this letter and a contract will be forwarded to the appointee indicating the intent of the adminis-

tration to offer a position to the appointee. The contract will contain:

1. The beginning rank.
2. The length of appointment.
3. The total annual salary.

The summary letter will state clearly prior oral and written agreements between the appointee and the appropriate Dean or Department Chairman and will include the following:

1. A definition of the letter as a final commitment, relative to the action of the President and the Board of Trustees.
2. Indication that the offer will become binding upon the signing of the contract.
3. The total length of the probationary period and at what point the appointee would be considered for tenure.
4. The length of annual service, i.e., three quarters.
5. The opportunity for employment in the Summer Session and approximate salary for such service.
6. The total teaching and contact hours over the annual period and, if possible, specific courses to be taught.
7. The date the appointee is expected to report and the date of his final annual duties under his appointment.
8. Enclosure of a copy of the current *Faculty Manual* of East Carolina University to inform the appointee of the institution's by-laws and regulations.

F. *Assignment of Duties*

The Chairman of the Department will assign the faculty members of his Department their specific duties and responsibilities. Each member of the departmental faculty will, in turn, be responsible to the Chairman for the proper discharge of his assigned duties.

G. *Continuation of Employment*

Appointments without tenure are probationary. Each faculty member without tenure shall be notified in writing by the President whether or not he will be rehired for the following year according to the schedule below:

March 1 for the first year
December 15 for the second year
One full academic year thereafter

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The decision regarding retention of a non-tenured faculty member will be made by the Department Chairman after such consultation with members of the faculty and the Dean of the College or School as he shall deem appropriate in each case. The Department Chairman annually will inform the non-tenured faculty member of his progress toward tenure both by personal conference and written résumé.

II. *Professional Advancement*

Two principles are incorporated in the following criteria and procedures for professional advancement. They are (1) flexibility in promotion and salary arrangements, and (2) appropriate recognition for merit and outstanding performance.

A. *Factors of Achievement and Service*

Two different sets of factors should be considered in estimating the faculty member's readiness for a salary increase and his worthiness for promotion in rank: (1) length of professional service and (2) merit.

Professional service factors typically include such consideration as (1) total service, covering both years at East Carolina University and equivalent service elsewhere, (2) total years in rank, (3) contributions to campus activities and committee work, (4) constructive relationship with colleagues, (5) skill and efficiency in handling classroom and campus routines, (6) community activities, and (7) membership in professional organizations. This does not express an attempt to establish priority.

Merit factors typically include such considerations as: (1) teaching effectiveness, (2) continued professional growth, (3) research activities, (4) creative and scholarly production, (5) leadership activity in a professional organization, and (6) government service.

Length of professional service clearly contributes to readiness for increase in salary. Promotion in professional rank, however, cannot be attained by mere accumulation of years of service. Professional distinction can be achieved only through outstanding performance in activities comprising the search for, the perpetuation of, and the dissemination of knowledge. Because promotion into the higher ranks should be the reward of significant professional achievement, it is

possible for any of the lower academic ranks to be a terminal rank.

B. *Criteria for Appointment and Promotion to the Several Academic Ranks*

Among the many qualification which may be considered when making appointments and promotions, the following are judged as essential:

Instructor — Evidence of character traits which contribute decidedly to the professional advancement of the well-trained person; evidence of a sound educational background for the specific position, including as a minimum the Master's degree or equivalent; and evidence of teaching ability.

Assistant Professor — Qualifications of the previous rank plus a terminal degree as recognized by the Southern Association of Colleges and Schools or the profession concerned or the Doctor's degree or substantial progress toward the Doctor's degree or terminal degree as described above; evidence of a potential for continued professional growth through study, membership in professional organizations, and creative activity in the form of research or publication.

Associate Professor — Qualifications of the previous ranks plus a terminal degree as recognized by the Southern Association of Colleges and Schools or the profession concerned or the Doctor's degree; a significant record of effective teaching or research at the college or university level; a record of creative or research activity resulting in publication or comparable productivity; a record of participation in professional organizations; effective service on college or university committees; and evidence of superior worth to the University.

Professor — Qualifications of the previous ranks plus achievement of an outstanding reputation as a teacher or in independent research; an extensive record of success in directing graduate study, research, or writing; a record of significant publication or comparable creative or research activity; a record of significant contribution as a member of faculty committees or the Faculty Senate, whenever called upon to serve; a record of participation in professional organizations.

C. *Effecting Promotions and Salary Increases.*

Recommendations for promotion and salary increases shall be initiated by the Chairman of the Department after such consultation with his staff as necessary to promote departmental concord and effectiveness. These recommendations are to be made in conformity with the criteria herein and are submitted to the Dean of the College or School for review in the light of the staff needs of his College or School as a whole. The Dean's recommendations are submitted to the Provost and the Vice President and Dean of the University, who must review the recommendations submitted by the various Colleges or Schools in the light of the total staff needs of the University. Upon their recommendations, the President will make the final decisions regarding promotion and salary increases, subject to the approval of the Board of Trustees.

III. *Advancement in Salary*

The University will strive to develop a plan for salary advancement which is reasonably related to promotion in rank. Such a plan should seek to realize the following objectives: (1) sense of security for each member of the University faculty, (2) range of rank and salary incentives to continued advancement in the profession, (3) a means of recognition of professional achievement, (4) appropriate remuneration for services performed, and (5) the maintenance of a uniform standard throughout the University.

IV. *Evaluation*

Promotions and increases in salary are subject to budgetary considerations and to a reasonable distribution of professional staff in the academic ranks. Practice in the several Colleges or Schools and in the Departments within a College or School should be relatively uniform. Exceptions should be made only in cases which are clearly unusual, as when maintenance of staff is threatened by a serious shortage of persons in specific disciplines. A promotion is ordinarily accompanied by a salary increase.

A. *Procedures for the Evaluation of Faculty*

The Deans of the various Colleges or Schools and the Chair-

men of Departments will develop a systematic procedure for the annual evaluation of faculty members, especially in the case of those members who do not have tenure. Such an evaluation procedure should be constructed upon the following principles: (1) objective criteria upon which evaluations are undertaken will be publicized; (2) the Deans and Chairmen will institute means that permit faculty members to report their achievements year by year; (3) records and reports will be on file in each departmental office to serve as objective evidence in support of promotions, salary increases, the grant of tenure or in support of decisions against promotions, salary increases, and the grant of tenure; (4) faculty members have the right to discuss their status with the Department Chairman and Deans at any time.

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B. *Guide for Evaluation of Faculty by Chairmen*

The Chairman's evaluation shall include all factors the Chairman may consider pertinent. Recommendations shall be based on definite statements accompanied by supporting evidence, including statements describing wherein and in what manner the faculty member does not meet expected performance.

A professional staff member may be deficient in one or several pertinent aspects, and yet be a highly useful and valuable member of the staff; on the other hand, a professional staff member may rate very highly in some respects, yet be generally a detriment to the University. It is the total makeup and performance of the individual that is significant, rather than a summation of discrete factors which might obscure this totality. Therefore, exercise of the most careful judgment is required in order to maintain demonstrable objectivity in an overall evaluation.

V. *Appeals*

In matters pertaining to promotion and salary increases the individual tenured faculty member has the right of appeal to the Faculty Affairs Committee. It is desirable that the right of appeal through the Department Chairman be utilized before an appeal is made to this committee.

The Faculty Affairs Committee shall consider all evidence pertinent to the requested promotion or salary increase and

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report its recommendation to the Department Chairman, appropriate Dean, President of the University, and Chairman of the Faculty. The Chairman of the Faculty shall be notified of administrative action on the Committee's recommendation; and, in the event that administrative action differs from the recommendation of the Committee, the Chairman of the Faculty shall be informed of the reasons for this decision.

VI. *Amendment Procedure*

Amendments to the East Carolina University Personnel Policy and Procedure for the Faculty may be proposed by any full-time member of the faculty or by any faculty committee. The proposed amendment or amendments shall be submitted to the Faculty Senate for consideration. In such a case the proposed amendment or amendments shall be handled as any other item of legislation which comes before the Senate.

Appendix C

PROVISIONS REGARDING TENURE AND ACADEMIC DUE PROCESS

I. *Academic Tenure*

A. Academic tenure refers to the conditions and guaranties that apply to a faculty member's professional employment. In according tenure, the purpose is to protect the academic freedom of faculty members, while providing them with a reasonable degree of economic security. It is recognized that tenure policy is a vital aid in attracting and retaining instructional personnel of the high quality which this University seeks for its faculty.

B. After the expiration of a probationary period (instructors and assistant professors five years, associate professors and professors three years), full-time faculty members have tenure, and their services will be terminated only for adequate cause. It is the prerogative of the President to shorten this probationary period of faculty members at his discretion. Each faculty member without tenure shall be notified in writing by the President whether or not he will be rehired for the following year according to the schedule below:

March 1, the first year
December 15, the second year
One full academic year thereafter

C. The terms and conditions of every faculty appointment shall be in writing. A copy thereof, signed by the President, shall be delivered to the faculty member and a copy shall be retained by the President. Full information on the tenure policy of the University and on his own employment status shall be readily available to the faculty member at all times.

D. A faculty member who decides to terminate his employment has the obligation, through appropriate channels, to give written notice of his intention to the President not later than May 15 or thirty days after receiving notification of the terms of his continued employment for the following year, whichever date occurs later.

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II. *Suspension and Discharge of Faculty Members*

A. A faculty member who has tenure may be suspended or discharged only by the President or by direction of the Board of Trustees, and then only in accordance with the provisions of this Code. Adequate cause for suspension or discharge is to be interpreted as (a) incompetence, (b) neglect of duty, or (c) misconduct of such a nature as to indicate that the faculty member is unfit to continue as a member of the faculty.

B. The President shall, through administrative channels: (a) give the faculty member written notice of intention to discharge with a copy to the Chairman of the Department or Dean of the College or School or (b) give the faculty member written notice that information concerning the faculty member is being referred to the faculty committee (identified in paragraph C, below) for its recommendation with a copy to the Chairman of the Department or the Dean of the College or School concerned. The notice shall indicate the reasons for the intended discharge or the substance of the information being referred, shall advise the faculty member of his right to a hearing, and shall call attention to the provisions of this Statement. Within two weeks after receipt of the notice, the faculty member may request a hearing by written notice to the President and the chairman of the faculty committee. If no request is filed within that time, the President may proceed to discharge, when notice of such intent has been given, or the faculty committee may proceed to the making of its recommendation without a hearing.

C. When a hearing is duly requested by the faculty member, it shall be accepted before a standing committee elected by the institution's Faculty Senate at the first meeting of the Senate in each academic year. The Committee shall be composed of five members and five alternates, all of whom must be members of the regular teaching faculty who hold tenure. They shall be elected for two-year terms on a rotating basis. The alternates serve when a regular member (a) is not available because of illness, on leave, off the campus for a protracted length of time; or (b) is the Dean of the College or School or Chairman of the Department in which the faculty member is employed; or (c) is challenged by the accused; or (d) wishes to disqualify himself. The hearing shall be upon written charges or a written summary of information submitted by the Presi-

dent. The hearing committee shall accord the faculty member a two-week period within which to prepare his defense. The faculty member shall have the right to counsel; the right to present the testimony of witnesses and other evidence; the right to confront and cross-examine adverse witnesses; the right to examine all documents and demonstrative evidence against him; and the right, upon request made prior to the hearing, to a transcript of the proceedings furnished at the expense of the University. The President or his delegate or counsel may participate in the hearing, present evidence and cross-examine witnesses. The hearing committee shall also have the right to counsel.

D. In reaching its decision in cases in which a hearing is held, the faculty committee shall consider only the evidence presented at the hearing and such oral or written arguments as the committee, in its discretion, may allow. Should the committee find that the faculty member is guilty of misconduct, incompetence, or neglect of duty, it shall then decide whether its findings in that respect, considered in the light of the faculty member's general competence and fitness, justify a finding that the faculty member is unfit to continue as a member of the faculty. It shall make its written recommendation accordingly, and shall transmit the recommendation to the faculty member and to the President. Publication of such recommendation may be authorized only by the President.

E. If the President concurs, a recommendation of the committee, whether favorable or unfavorable to the faculty member, shall be final unless appealed to the Board of Trustees. The defendent shall have a right to a hearing before the Board of Trustees, if requested within two weeks of a decision by the faculty hearing committee. If the committee's recommendation is other than for unconditional retention, the President, in lieu of concurrence, may, with the consent of the faculty member, take any action more favorable to the faculty member than the committee's written recommendations, which action shall be final.

F. In any case brought before the Trustees, a hearing shall be accorded by the Executive Committee or a special committee of the Trustees appointed by the Chairman of the Board. The hearing shall be conducted in the same manner as

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the hearing before the faculty committee; the faculty member shall have the same rights; and the decision of the hearing committee shall be reached solely upon the evidence adduced at the hearing and such argument, oral or written, as the hearing committee may allow. The charges or summary of information shall be the same as those before the faculty committee, unless modified in favor of the faculty member, with his concurrence, by the President of the University; and the hearing committee shall, in the same manner as the faculty committee, consider general fitness as well as the specific offenses. If the recommendation of the faculty committee is sustained, the case is closed. It it is not sustained, the Trustees shall return the case to the faculty committee with objections specified. The committee shall reconsider the case in the light of the objections of the Trustees, receiving new evidence, if necessary. It will reframe its decision, communicating it to the President of the University for transmittal to the Trustees. After study of this decision the Trustees shall reach the final judgment in the case.

G. Once he has requested a hearing, the faculty member shall not be discharged, without his consent, until final decision is reached (and then only in accordance with such decision), provided that the faculty member may at any time withdraw his request for hearing and consent to the discharge; or he may be discharged upon a finding by the faculty committee that, at any stage of the proceedings before the faculty committee or the Trustees' committee, the faculty member, after requesting a hearing, has, without adequate cause, failed to appear.

III. *Definitions*

A. Incompetence — Assuming that a faculty member is competent when granted tenure, incompetence will mean gross ignorance of information in his field and specialty which may come about through his having forgotten this information or not having kept abreast of scholarship. Such a charge is to be adjudicated by a committee of three authorities in the accused's field outside the institution in the following manner: one member chosen by the committee, two members chosen by the accused.

B. Neglect of Duty — Neglect of duty will mean: (a) failure

to teach relevant material and/or (b) flagrant or persistent refusal to obey University regulations.

C. Misconduct — Misconduct will mean: (a) the conviction for transgression of criminal statutes, (b) gross deviation from accepted moral standards.

PART I

Introduction

This manual has been designed to provide faculty members with a ready reference to established policies and procedures at East Carolina University. Suggestions for additions and revisions are encouraged and should be made directly to the Provost.

It is asked that each new faculty member become familiar with the contents of this manual immediately. All members of the University family should use it for reference whenever occasion demands.

East Carolina University is an Equal Opportunity Employer. The University will consider all applicants for employment and handle all employee matters without regard to race, sex, creed, color, or national origin. Every effort will be made to insure fair treatment for each and every employee at all times.

PURPOSE AND OBJECTIVES OF EAST CAROLINA UNIVERSITY

The purpose of East Carolina University is to offer a liberal and practical education and to promote research in order to serve a free society.

In pursuit of this purpose, East Carolina University pledges itself:

To provide a proper atmosphere for the intellectual development of qualified students.

To maintain a faculty dedicated to scholarship and the purposes of a university.

To create knowledge through research in all disciplines.

To be cognizant of new knowledge and to be ever ready to meet the challenge of new ideas.

To expand the cultural horizons and to develop an appreciation of the good and the beautiful

To cooperate with other institutions of higher learning for the betterment of mankind.

Fundamental to these objectives is the belief that a university must always seek the truth, teach the truth, and preserve the truth.

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procedure and the availability of the materials. When the material arrives, the borrower is notified by mail.

Interlibrary loan service will be suspended in the winter quarter between December 1 and January 1, in the spring quarter after May 1, and in the summer session after August 1.

EVALUATION OF STUDENTS

Student Information Services

The complete folders of all students are housed in the Registrar's (Central Records) Office in the Whichard Building. Faculty members are invited to come in and study these records whenever they so desire. Such folders contain standardized test scores, infirmary examinations, and other useful evaluative materials which afford valuable indices to the student's behavior and probable future development.

In addition, the University is equipped to do extensive testing of individual students where the situation warrants it.

Student Counseling

Faculty members should assume responsibility for much of the personal counseling of students to the extent of their competency and the time and facilities available to them. At times, however, it will be advisable for faculty members to refer students to other persons and agencies for more intensive study and assistance. Student referrals should be made directly to the Dean of Student Affairs. Faculty members should use the referral blanks provided to each Department for such cases. One copy should be sent to the Dean of Student Affairs when such referrals are made. For example, students with poor study habits, low reading skills, confused vocational objectives, and persistent personal problems should be sent to the Director of the Counseling Center for referral to one of the student-service agencies where more direct assistance may be provided.

APPOINTMENT

The power of appointment and removal of a member of the instructional staff is vested in the Board of Trustees. The Board in general expects recommendations for appointments to come from the President, who takes into account the recommendations of the appropriate Deans and Department Chairmen. See Appendix B, Personnel Policy and Procedure for the Faculty.

RANKS

The University faculty consists of all members of the teaching staff with the ranks of Professor, Associate Professor, Assistant Professor, Instructor, and administrative officers as designated by their teaching ranks or by the Board of Trustees.

Teaching Fellows are not formal members of the University faculty.

PROMOTION

Progress through academic ranks is ordinarily relatively slow. There are no automatic promotions based merely on length of service. Recommendations based on merit are usually made with supporting materials by the appropriate Dean or Chairman to the President through the Vice President and Dean of the University and Provost.

Among the factors considered in evaluating the work of a faculty member are successful teaching, significant research and publication, professional recognition, and service to the University and the community. See Appendix B.

TENURE

After the expiration of a probationary period, faculty members are considered to have tenure and their services will be terminated only for adequate cause. Tenure ends at age 65. See Appendix C for complete statement of Tenure and Academic Due Process.

LEAVE OF ABSENCE

Leaves of absence for one or more quarters without salary may be arranged with faculty members on tenure for the pur-

Opposition

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1597

IN THE

Supreme Court of the United States

October Term 1981

MARTIN JOSEPH KILCOYNE,

Petitioner

v.

ROBERT MORGAN, etc., et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THIS COURT HAS JURISDICTION TO CONSIDER PETITIONER'S CLAIM THAT HE ACQUIRED *DE FACTO* TENURE AND, IF SO, WHETHER THE LOWER COURTS CORRECTLY FOUND THAT PETITIONER DID NOT HAVE *DE FACTO* TENURE, OR ANY OTHER FORM OF PROPERTY RIGHT, IN CONTINUED EMPLOYMENT?

II. WHETHER THE LOWER COURTS CORRECTLY HELD THAT PETITIONER HAD NO PROPERTY RIGHT IN CERTAIN PROCEDURES INCIDENTAL TO THE DECISION TO NOT GRANT HIM TENURE WITHIN THE MEANING OF THE DUE PROCESS CLAUSE.

PARTIES

The parties to the proceedings in this action are Petitioner Martin Joseph Kilcoyne, former Associate Professor of History at East Carolina University (ECU), who seeks to have the Judgment of the lower courts reversed and Respondents Robert Morgan, Chairman of the Board of Trustees of ECU; William Friday, President of the University of North Carolina; Leo Jenkins, Chancellor of ECU; Robert W. Williams, Provost of ECU; and Herbert R. Paschal, Chairman of the Department of History at ECU.

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NO. 81-1597

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MARTIN JOSEPH KILCOYNE,

Petitioner

v.

ROBERT MORGAN, etc., et al.,

Respondents

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The most recent and final opinion of the United States Court of Appeals for the Fourth Circuit in this case, No. 81-1069, is reported at _____ F. 2d _____, and is reproduced as Appendix A to Petitioner's Petition for Writ of Certiorari.

The final Order by the United States District Court for the Eastern District of North Carolina adopting the Magistrate's Memorandum and Recommendation of dismissal is reproduced as Appendix B, with the Magistrate's Memorandum and Recommendation reproduced as Appendix C of the Petition.

The Order by the United States District Court for the Eastern District of North Carolina adopting the Magistrate's Memorandum and Recommendation of partial summary judgment and partial dismissal is reproduced as Appendix D, with the Magistrate's Memorandum and Recommendation reproduced as Appendix E of the Petition.

The first opinion in this case of the United States Court of Appeals for the Fourth Circuit, No. 75-1372, is reported at 530 F. 2d 968, and is reproduced as Appendix H. A Supplemental Opinion following a petition to reconsider filed by the plaintiff is unpublished, but is reproduced as Appendix G of the Petition. Respondents' subsequent Petition for rehearing upon this Supplemental Opinion was denied. The Fourth Circuit's Order in this regard is reproduced as Appendix F to the Petition.[1]

The initial opinion of the United States District Court for the Eastern District of North Carolina in this cause is reported as 405 F. Supp. 828 (E.D. N.C. 1975) and is reprinted as Appendix I of the Petition.

JURISDICTION

With respect to the first question presented under this petition, the final mandate of the Fourth Circuit was filed on March 3, 1976.[2] This Petition for Writ of Certiorari was filed in this Court on February 24, 1982. Thus, the writ as to this contention is untimely filed under 28 U.S.C. §2101(c) and should be dismissed. This Court has no jurisdiction over this question. With respect to the second question presented, jurisdiction is invoked by petitioner under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

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[1]Petitioner has erroneously described the timing of the Fourth Circuit's Supplemental Opinion and Petition for rehearing in his Petition at p. 2.

[2]Appendix p. 31 (hereinafter abbreviated "A").

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within any jurisdiction the equal protection of the laws.

United States Code:

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This action was commenced by the filing of a complaint on April 4, 1973 in which the petitioner alleged that his termination from the respondent University was illegal. The action was grounded solely on the Constitution and laws of the United States and the jurisdiction asserted was 42 U.S.C. §1983. Two basic issues were raised in this complaint: (1) did respondents' regulations bestow *de facto* tenure upon the petitioner and (2) did the respondents fail to follow their own regulations in determining not to renew petitioner's contract (thus, denying him tenure) and, if so, was this failure a denial of due process?

Following pretrial discovery and the filing of stipulations by the parties, petitioner filed a motion for summary judgment. Respondents responded with a cross motion for summary judgment. Both motions were accompanied by supporting affidavits. In a Memorandum and Opinion and Order filed on February 5, 1975, the United States District Court granted respondent's motion, holding that petitioner had neither achieved tenure nor been deprived of constitutional rights. KILCOYNE v. MORGAN, 405 F. Supp. 828 (E.D. N.C. 1975).[3] Petitioner appealed this decision to the Fourth Circuit Court of Appeals and in the first opinion of the court, the trial court's order was affirmed in all respects. KILCOYNE v. MORGAN, 530 F. 2d 968 (4th Cir. 1975).[4] In a Supplemental Opinion following a petition to reconsider filed by the petitioner, however, the court, in an unpublished opinion, split its decision on the two issues of the case.[5] It again affirmed the findings of the district court with regard to the *de facto* tenure question, but remanded

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[3]A p. 36.

[4]A p. 34.

[5]A p. 31.

on the issue of failure to follow regulations. The Fourth Circuit appeared to be concerned with the possibility that a factual dispute existed on this issue and asked the district court to decide whether there had been sufficient compliance with the University's own regulations. Specifically, the case was remanded for trial to determine whether there had been a breach of contract and whether respondents' conduct amounted to a denial of due process. Thus, at this point the case apparently consisted of a federal due process claim and a state law breach of contract claim.

On July 30, 1979, respondents again moved for summary judgment on the grounds that the federal claim lacked substance and that the pendent state claim would necessarily fall on dismissal of the due process allegations. On February 5, 1980, the District Court Judge accepted the Recommendations of the Magistrate which granted summary judgment on the federal cause of action, but retained jurisdiction over the state claim.[6] Thus, at this point, the case was pared to a single claim: did respondents breach petitioner's contract?

Respondents then pursued a complete dismissal for the third time. On March 12, 1980, a Rule 12(b) motion was filed, the basis being that a recent decision of the North Carolina Supreme Court precluded federal court consideration of the state law claim. In an Order dated November 25, 1980, the district court adopted the recommendation of the federal magistrate and dismissed the case.[7]

Petitioner appealed to the Fourth Circuit on November 27, 1981. That Court upheld the District Court's Orders on both the due process and breach of contract claims.[8] This Petition followed.

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[6]A p. 11.

[7]A p. 7.

[8]A p. 1.

REASONS FOR DENYING THE WRIT

The respondents urge the Court to deny the Petition for the reasons hereinafter set forth.

I. THE DE FACTO TENURE CLAIM

As noted in the Jurisdictional Statement above, the claim of *de facto* tenure was finally rejected by the Fourth Circuit Court of Appeals on March 3, 1976. Although the case was remanded for further consideration of petitioner's *other* due process and state law claims, the tenure question was laid to rest on this 1976 date. No petition for certiorari was filed at that time. Now nearly six years later, certiorari is requested on this issue. Clearly the constraints and limitations of 28 U.S.C. §2101(c) have been ignored and jurisdiction over this contention has been lost.

Both Rule 20 of the United States Supreme Court Rules and subsection (c) of 28 U.S.C. §2101 require that a petition for certiorari be filed within ninety days of the entry of the circuit court decree. This time limit is not permissive; unless this deadline is observed, further review is precluded. See BRADFORD ELECTRIC LIGHT CO., INC. v. CLAPPER, 284 U.S. 221, 76 L.Ed. 135, 52 S.Ct. 118 (1931). As this Court has noted on numerous occasions, the appropriate result is a complete dismissal of the tardy claims. See e.g., WHITSETT v. UNION DEPOT, 122 U.S. 363, 30 L.Ed. 1150, 7 S.Ct. 1248 (1887). Indeed, this Court has stated that it lacks all jurisdiction to entertain such untimely contentions. See TOLEDO SCALE CO. v. COMPUTING SCALE CO., 261 U.S. 399, 67 L.Ed. 719, 43 S.Ct. 458 (1923).

The first question presented then should be dismissed at the outset without substantive review. Because it is clearly untimely and violates the set limits of 28 U.S.C. §2101(c), there is no jurisdiction for its consideration at this time by this Court. Respondents strongly urge you

to dismiss this claim. Even if the time limits are avoided, however, there is no merit to petitioner's Fourteenth Amendment argument. A substantive dismissal is therefore an alternative route to rejection of the *de facto* tenure claims.

Petitioner was first employed as an Associate Professor in the Department of History at East Carolina University (ECU) for the 1969-70 academic year. That contract was renewed for the 1970-71 and 1971-72 academic years. On September 20, 1971, petitioner was advised by the Chancellor of ECU that he would be reemployed for the 1972-73 academic year.[9] In that letter, petitioner was further advised:

> "This letter is not notification of tenure. As you know, under the current tenure policy, notification of tenure must be made by the end of the third year . . . ."[10]

Near the end of his third year of employment—April 20, 1972—petitioner was notified by the Chancellor that he would not receive tenure and that the 1972-73 academic year would be his final year of employment.[11]

Despite these express and clear statements by the Chancellor to the contrary, petitioner claims that he acquired *de factor* tenure by virtue of his reemployment for a fourth year, the 1972-73 academic year. He relies upon a single sentence in the ECU Faculty Manual. The sentence is:

> "After the expiration of a probationary period [instructors and assistant professors five (5) years, associate professors and professors three (3) years], full time faculty members have tenure, and their services will be terminated only for adequate cause."[12]

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[9]A p. 37.

[10]A p. 38.

[11]A p. 38.

[12]A p. 52.

Petitioner's argument ignores other pertinent provisions of the Faculty Manual and the uncontradicted interpretation of the various provisions of the Faculty Manual relating to tenure by respondents. Under the Faculty Manual:

> "Appointments without tenure are probationary. Each faculty member without tenure shall be notified in writing by the president whether or not he will be rehired for the following year according to the schedule below:
>
> March 1 for the first year.
> December 15 for the second year.
> One full academic year thereafter."[13]

The probationary period for associate professors is three (3) years. In order to comply with the notification requirements regarding reappointment and, at the same time, to have the full benefit of the three year probationary period in order to evaluate a faculty member's fitness for tenure, it was the practice of respondents to notify associate professors at the beginning of their third year of reemployment for a fourth year—expressly reserving judgment on tenure at that time—and to make the tenure decision itself by the end of the third year of employment. This interpretation was deemed permissible because the Faculty Manual specifically provides that "appointments without tenure are probationary" and because the Faculty Manual contains no prohibition against the employment of a faculty member without tenure beyond the expiration of his probationary period. At the same time, this practice and interpretation provided a faculty member who did not receive tenure with at

[13]A p. 46.

least a year of employment in which to secure other employment.

The lower courts correctly held that the petitioner had not acquired any property right in his employment under these circumstances. "To have a property interest and a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." BOARD OF REGENTS v. ROTH, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L.Ed. 2d 548, 561 (1972). In other words, there must exist, either in writing or orally, a "mutually explicit understanding of entitlement to a benefit." PERRY v. SINDERMANN, 408 U.S. 593, 602, 92 S.Ct. 2694, 33 L.Ed. 2d 570, 580 (1972); McNEILL v. BUTZ, 480 F. 2d 314, 321 (4th Cir. 1973); SHEPPARD v. WEST VIRGINIA BOARD OF REGENTS, 516 F. 2d 826, 829 (4th Cir. 1975).

Given the express statements of the Chancellor of ECU to the petitioner it is doubtful that the petitioner even reasonably had any "unilateral expectation" of tenure. Whatever petitioner's understanding, however, respondents beyond peradventure never understood that the mere act of reemployment of an associate professor for a year beyond his probationary period conferred tenure. Thus, there was no "mutually explicit understanding," no "meeting of the minds," between the parties upon the precise fact which plaintiff claims entitlement to tenure.

A large number of faculty members whose contracts of employment were terminated have asserted entitlement to *de facto* tenure on a number of grounds. These claims have consistently been rejected. See, e.g., PLUMMER v. BOARD OF REGENTS, 552 F. 2d 716 (6th Cir. 1977); RYAN v. AURORA CITY BOARD OF EDUCATION, 540 F. 2d 222 (6th Cir. 1976), *cert. den.* 429

U.S. 1041, 97 S.Ct. 741, 50 L.Ed. 2d 753 (1977); STEBBINS v. WEAVER, 537 F. 2d 939 (7th Cir. 1976), *cert. den.* 429 U.S. 1041, 97 S.Ct. 741, 50 L.Ed. 2d 753 (1977); BERTOT v. SCHOOL DISTRICT NO. 1, 522 F. 2d 1171 (10th Cir. 1975); and SHEPPARD v. WEST VIRGINIA BOARD OF REGENTS, *supra*. In particular, certain faculty members have asserted entitlement to *de facto* tenure by virtue of their length of service or employment beyond the probationary period prescribed by tenure regulations. These claims, indistinguishable from the petitioner's have all been rejected. See BEITZELL v. JEFFREY, 643 F. 2d 870 (1st. Cir. 1981); McELEARNEY v. UNIVERSITY OF ILLINOIS, 612 F. 2d 285 (7th Cir. 1979); HAIMOWITZ v. UNIVERSITY OF NEVADA, 579 F. 2d 526 (9th Cir. 1978); RYAN v. AURORA CITY BOARD OF EDUCATION, *supra*; SHEPPARD v. WEST VIRGINIA BOARD OF REGENTS, *supra*; and CUSAMANO v. RATCHFORD, 507 F. 2d 980 (8th Cir. 1974) *cert. den.* 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed. 2d 46 (1975). Petitioner's claim should be dealt with in the same manner.

II. THE OTHER DUE PROCESS CLAIM

Petitioner also contends that there was a failure to follow certain procedures in the Faculty Manual and that this alleged failure constituted a deprivation of property in violation of the Fourteenth Amendment. Though the petitioner at other times has focused upon other alleged procedural defects, at this level his central claim relates to failure to provide reasons for the decision to deny him tenure. As we argued below, we do not concede that any procedures were ignored; indeed we firmly believe that all the required steps were followed in the decision not to recommend petitioner for tenure. Regardless of compliance, however, Dr. Kilcoyne had no property interest in these provisions

and thus has no due process claim to put before this Court.

Before a Fourteenth Amendment due process violation may even be considered, the existence of a viable property right must first be shown. See BODDIE v. CONNECTICUT, 401 U.S. 371, 29 L.Ed. 2d 113, 91 S.Ct. 780 (1971). Property rights are creatures of state law based upon mutually explicit understandings that contain within their boundaries the entitlement to a benefit. See BOARD OF REGENTS v. ROTH, *supra*. PERRY v. SINDERMANN, *supra*. Unilateral expectations are not sufficient and an indefinite or abstract need or desire for the benefit does not trigger the Fourteenth Amendment procedures. See BISHOP v. WOOD, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976); BOARD OF REGENTS v. ROTH, *supra*.

Further, the benefit itself must be a substantial one; that is, it must truly be a valuable guarantee. In employment cases, this translates into a *right to employment*. Terms and conditions of employment are not generally protectable property rights. See, e.g., SIGMON v. POE, 564 F. 2d 1043 (4th Cir. 1977). Indeed, the leading Supreme Court cases in the employment area by implication buttress this position. See BOARD OF REGENTS v. ROTH, *supra*. and PERRY v. SINDERMANN, *supra*. See also LEIS v. FLYNT, 439 U.S. 438, 58 L.Ed. 2d 717, 99 S.Ct. 698 (1979), where the Supreme Court implied that the identification of a property right rests on the substance of the benefit claimed.

Petitioner had no right to continued employment; thus, petitioner can show no property right coincident with his employment sufficient to draw the Fourteenth Amendment into play. Put simply, whatever rules petitioner claims were violated are minor matters of no substance in a property rights context. Since the

Fourteenth Amendment protects against deprivation of substantial benefits, petitioner has not stated a claim for relief and this action must be dismissed. As the Fourth Circuit noted, the lack of a right to further employment completely negates any claim to particular procedures.[14]

We believe this simple reasoning sufficient for this case. There is, however, a growing body of case law where the failure to follow institutional rules has been the central issue for decision.[15] These cases then partially focus the inquiry for the case at bar and establish a framework for identifying the property interests the Fourteenth Amendment was designed to protect.

Several recent cases have considered the question of whether written reasons for a contract nonrenewal are a requirement of due process. In RYAN v. AURORA CITY BOARD OF EDUCATION, *supra*, the precise issue here raised by petitioner was considered. There, a board of education had regulations requiring that written reasons be given to teachers whose contracts were not renewed. The plaintiff teachers received notice of nonrenewal but no reasons for the action were given.

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[14]A p. 5.

[15]The Supreme Court itself has looked at a plaintiff's contention that failure to follow institution rules amounted to a constitutional violation. Such a contention was rebuffed in the recent Supreme Court case, BOARD OF CURATORS v. HOROWITZ, 435 U.S. 78, 55 L.Ed. 2d 124, 98 S.Ct. 948 (1978). There Justice Rehniquist noted that reliance for this argument on such cases as SERVICE v. DULLES, 354 U.S. 363, 1 L.Ed. 2d 1403, 77 S.Ct. 1152 (1957) and ACCARDI v. SHAUGHNESSY, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954), is misplaced. Those cases deal only with federal *administrative* law and do not state constitutional principles binding upon the states. *Id.* 435 U.S. at 92 fn. 8.

The Board's failure to follow its own regulations was alleged by plaintiffs to be a denial of due process, the claim being that there was a property interest in having the regulations followed. In dismissing the complaint, the court noted first that the plaintiffs had no right to continued employment. Thus, they could not show an entitlement giving rise to a property right. In so holding the court adopted the reasoning of then Circuit Judge Stevens in JEFFRIES v. TURKEY RUN CONSOLIDATED SCHOOL DISTRICT, 492 F. 2d 1, 3-4 (7th Cir. 1974):

> "'But [since], by hypothesis, *no constitutionally protected property or liberty interest of the teacher is impaired by the Board's action, she has no federally protected right to a fair hearing on a fair statement of reasons.* The fact that a state, or a school board *may voluntarily communicate more information to her, or receive more information from her, than the Constitution requires, is not in itself sufficient to create a federal right that does not otherwise exist.*
>
> "'A written statement of reasons may have great significance as evidence, for example, that a particular Board decision was motivated by constitutionally impermissible reasons. . . . *But the statement itself is just evidence, not an aspect of the state's legal process that is subject to federal supervision and control mandated by the United States Constitution.*'" 540 F. 2d at 228 (emphasis implied).

Finally, the RYAN court noted that issues concerning regulations and written reasons are matters of state law and should only be considered by state courts. The only issues cognizable in a federal court are those of a

constitutional magnitude and plaintiff's complaint was a good distance from this threshold.

The Fourth Circuit dealt with a similar issue in SIGMON v. POE, *supra*. Finding no due process violation in a school board's failure to give reasons, a dismissal was ordered. In summing up its holding, the court emphasized: "Every disagreement between a public employee over matters of state law or the terms of his contract does not reach constitutional proportions." 654 F. 2d at 1096. Another Fourth Circuit case in this area is SATTERFIELD v. EDENTON-CHOWAN BOARD OF EDUCATION, 530 F. 2d 567 (4th Cir. 1975), where again the court dismissed the due process claims based on the absence of written reasons. The court held that where there is no right to continued employment, neither a property right nor a right to any due process procedures exists.

Another group of cases concerns the terms and conditions of employment. In these cases a distinction was made between a guarantee to continued employment and a disputed condition or contract provision incident to that employment. The various courts noted that while a property right exists in the former situation, no such entitlement is present in the latter. In BERRY v. CITY OF PORTSMOUTH, 562 F.2d 307 (4th Cir. 1977), a city ordinance provided for disability retirement benefits. When plaintiffs were denied the full range of insurance benefits, they brought suit claiming that the ordinance provided the necessary guarantee and thus the deprivation concerned "property." The Court disagreed, finding no constitutional protectable property interest in the retirement fund.

The Fourth Circuit faced a similar situation in HEATH v. CITY OF FAIRFAX, 542 F.2d 1236 (4th Cir. 1976) where

a city ordinance provided for salary increases in certain situations. The plaintiffs' suit, alleging a property right to the increases, was dismissed, the court again holding that no Fourtheenth Amendment property right existed. It is important to recognize that both the BERRY and HEATH cases concerned regulations incident to employment and resulted in dismissals, the Court finding no property right in having the particular regulations followed. Also of note is the fact that both cases concerned important terms of employment: fringe benefits and salary increments. Viewed in this light, the provisions at issue in the case at bar, a written resume and a conference, seem even further removed from a property right identity. If no property right exists in the fringe benefits and salary increment area, then surely none exist here.

Another case from the Middle District of North Carolina dealing with a similar issue in higher education sheds more light. In CLARK v. WHITING, 607 F.2d 634 (4th Cir. 1979), the faculty manual listed various steps to be followed in making a promotion decision. When the plaintiff was denied a promotion, he sued, claiming that this deprivation violated the due process clause. The district court granted defendants' motion to dismiss, finding that the manual's provisions did not contain a property right guarantee. In a lengthy and well-reasoned opinion, the Fourth Circuit affirmed the District Court, holding that the clear absence of a property or liberty interest negated any right to due process protections.

BATES v. SPONBERG, 547 F.2d 325 (6th Cir. 1976), is of particular importance here because of its factual similarity to the case at bar. There a faculty handbook set out procedures for the dismissal of tenured faculty. Under these regulations, the faculty member was

entitled to a hearing before a faculty committee and a subsequent "review of the record" by the board of regents. Plaintiff, a tenured faculty member, was dismissed and subsequently afforded a hearing before a faculty committee. However, no review was undertaken by the board of regents and the plaintiff claimed this breach violated the Fourteenth Amendment. The Sixth Circuit disagreed and reasoned as follows:

> "It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional process of state institutions." 547 F.2d at 329-330.

In finding that the institution's disregard of its rules did not rise to a Fourteenth Amendment violation, the court noted that even though plaintiff was tenured and thus had a right to notice and hearing, these prerequisites had been provided. Since there was no property right in the review procedure itself the omission of this process did not constitute a constitutional error.

Comparison with the case at bar is instructive. Here, petitioner was not tenured and thus had no right to a due process hearing when his contract was not renewed. His claim is then substantially weaker than that in BATES where a property right to employment was at least tangent to the issue. If indeed no right to review exists for a dismissed tenured faculty member, then surely no right to any particular provision exists for a nontenured faculty member whose contract is simply not renewed.

These cases then bear out the principle that property rights in the employment context exist only in the employment itself. There is no independent property right in the incidents, terms, or conditions of employment. While there may be a dispute under state law as to the effect of a failure to follow such provisions, there is no room in federal court for their review.

To summarize these due process cases, we find the following rules to be established and judicially supported: (1) due process protections do not attach absent a property interest; (2) the property interest must be substantial in and of itself; it must be a valuable benefit and not a minor procedural privilege; (3) in employment cases, property rights are those that guarantee continued employment; (4) where a property interest exists, no particular procedures are required, even where an institution or agency has rules governing the procedures; (5) thus, a deviation from agency rules does not constitute a denial of due process. This principle is particularly true where no property interest is at stake at all.

In evaluating what is and what is not a property right, the following points are pertinent in the employment context. As noted above, a guarantee to employment is usually the required showing. Provisions for fringe benefits or salary increases, though they involve something of "value", are not considered to be property interests in a constitutional sense. The same principal holds true for contract provisions or regulations requiring certain kinds of hearings or pre-hearing procedures. Finally, the courts when confronted with such questions are almost unanimous in their characterization of such issues as state law claims at best without any constitutional dimension. The federal court is neither an appropriate forum nor vested with jurisdiction for their entertainment.

Turning back to the specific facts in the case at bar, we believe the principles and holdings catalogued above demand only one result—petitioner's claims must be dismissed. As noted above and found earlier by the Fourth Circuit, petitioner had no right to continued employment and thus had no property right to which due process protections would attach. This being so, *no* procedures were constitutionally required, whether called for by institutional regulation or not. Thus, even if procedures were modified or omitted entirely by respondents in deciding not to grant tenure to the petitioner (a point we do not concede), no constitutional violation occurred. Deviations from and changes in agency or institution procedures, even where salary or fringe benefits are concerned, are *not* violations of due process. The procedures at issue here, a written resume and personal conference, are of much less importance than those in question in the cases above. If the deviations in those cases were found insubstantial, no less a result is warranted here. We believe then that the dismissal of petitioner's due process claims was the proper route to travel here. Even facial validity in the allegations was missing. The conclusion of the Fourth Circuit in this regard should be affirmed.

CONCLUSION

We believe the Fourth Circuit was completely correct in granting the respondents' Motions for Summary Judgment and Dismissal. Petitioner was not deprived of property in violation of the Fourteenth Amendment and thus his due process claims lack substance and should not be entertained. Further, at least with respect to the first question presented, the petition is untimely and should be dismissed for procedural errors.

Whichever route this Court chooses, we believe a correct result is a complete denial of the Petition for Certiorari. Put simply, there is nothing of substance for this Court to review.

This the 29th day of March, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served this day upon counsel for petitioner, by depositing three copies of said brief in the United States Mail, postage prepaid, addressed as follows:

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This 29th day of March, 1982.

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